Gunnison Basin POWER
People Opposing Water Export Raids

DATE: 7-22-99
TO: POWER Members J.C. P.C.K. P.V.
FROM: Steering Committee: John Cope, P.C. Klingsmith, Paul Vader
SUBJECT: Annual Report

During 1998-1999, POWER has concentrated almost all of its energy upon issues of Colorado River Compact-- arguing in some detail that Colorado's continued flirtation with further trans-mountain diversion is almost certainly in direct violation of many key provisions of the Colorado River Compact.

The basis of POWER's contention, supported by good, factual information from the Colorado Water Conservation Board and other sources, is that there is almost never enough water in the Colorado River to allow Colorado to fulfill its Colorado River Compact obligations to its down-stream neighbors, Arizona, California, Nevada and Mexico **AND** to divert further large quantities of water from the headwaters of The Colorado east to the Front Range.

As developers, water managers, and politicians in Colorado continue to discuss plans for trans-mountain diversion as if there were no conflict between those plans and the Colorado River Compact, they run the grave risk of provoking Lower Basin states--which cannot afford to lose water required by the millions of citizens who inhabit the Great American Desert-- to demand all of the Colorado River water that the River Compact allots them--and, likely, much more.

Since current practices for dividing up Colorado River water between Upper and Lower Basin states are generous in favor of Upper Basin states, any action which provokes Lower Basin states to abandon the status quo by demanding a strict interpretation of the Compact is bound to increase allotments to Lower Basin states and to decrease allotments to the Upper Basin States. The irony is inescapable: by attempting to grab more water for the Front Range, proponents of trans-mountain diversion seem hell bent on provoking Lower Basin states to demand their rightful share and, thus, to disturb the present favorable balance of allotments, making **LESS** water available in Colorado.

Furthermore, the Compact is not written in stone; it clearly provides for its own revision in the event that any of its signatories become dissatisfied with existing allotments of water (Articles III g, VII, IX). POWER believes that Colorado's plans for trans-mountain diversion are very likely to supply Lower Basin states with the bone of contention they need to begin the process of reinterpreting the Colorado River Compact in favor of the Lower Basin.

The political and economic power of large populations in Arizona, California and Nevada are certain to make any water fight between Colorado and the Lower Basin unwinnable by Colorado. At the present time, for example, California has 56 representatives in Congress; Colorado has

only 5. The Lower Basin is home to 3 Supreme Court Justices; the Upper Basin states claim none. Or, should Lower Basin states argue that future allocation of Colorado River water be based upon the wealth it produces, who could dispute the fact that one ton of hay grown on an acre in the Upper Basin has an estimated market value of $100.00 while one ton of strawberries grown on one acre or less in the Lower Basin can have an estimated market value exceeding $20,000.00?

POWER has elaborated and discussed these Colorado River issues with the Upper Gunnison River Water Conservancy District, the Commissioners of Gunnison, Hinsdale and Saguache Counties and with various water managers in Colorado and in the Upper Basin. It has also sent copies of this correspondence to selected Colorado senators and representatives and to the Attorney General of Colorado.

Responses to POWER's correspondence and oral presentations have ranged from non-committal on the part of the River District and County Commissioners to out-right hostile on the part of some of Colorado's water managers.

Perhaps the most generous interpretation of these responses is that they represent local and state entities' inability to confront or grapple with momentous issues that reach well beyond the limitations of Colorado water courts and water law.

From this perspective, the River District and the County Commissioners already have their water glasses full of pressing local issues--the most important of which are opposing trans-mountain diversion in Colorado water courts and trying to prove, also in Colorado water courts, that the Gunnison Valley has made sufficient progress toward using its conditional water rights to avoid having those rights lapse.

Meanwhile, Colorado senators and representatives seem unwilling to stir up a controversy that directly affects growth on the Front Range. Colorado and Upper Basin water managers--whose responses have been the most detailed and the most critical--can hardly be expected to agree with POWER that their own interpretations of the Compact are a ticking time bomb.

Because POWER's arguments have, so far, fallen upon deaf ears, the Steering Committee now believes that it is time to go public--to take our arguments to environmental groups and Colorado citizens on the Front Range as well as to seek some kind of decisive resolution within the regional politics of the West--even though we do not wish to take the matter up interstate if we can avoid it.

In spite of understandable hesitation in local commissions and water districts, and among Colorado water managers, to bring issues of this magnitude and potency out of the confines of Colorado water law and into the light of public scrutiny and regional politics, POWER believes that it is only these issues which can put an end to further, dangerous trans-mountain diversion in Colorado once and for all.

Adjudication of trans-mountain diversion in Colorado water courts seems bound to take decades and, since down-stream states are very likely to challenge any Colorado Supreme Court decision to permit trans-mountain diversion, there is no assurance that legal resolution in Colorado will be

final any time in the near future.

It is only the permanent resolution of conflicts affecting the entire Colorado River Basin discussed herein that can resolve the threat of further trans-mountain diversion in Colorado conclusively and, therefore, these are the water issues which offer Coloradans the greatest hope of a future that includes prosperity for both eastern and western Colorado, pristine environments as well as suburban developments, wild, wilderness experiences as well as culturally stimulating, urban ones.

Other issues with which POWER has been occupied during 1998-1999 are:

* The need for the River District to pay more attention to the uses of water by Gunnison Valley citizens and visitors, other than irrigators, in its efforts to prove diligence in Judge Brown's water court.

  POWER does not wish to devalue or to impinge upon the needs of irrigators but, rather, to recognize the needs of other citizens who also use the valley's water and contribute significantly to the region's economy.

* The need of the River district not to place too much emphasis on dams and irrigation within the Gunnison Valley in its efforts to prove diligence. POWER believes that a substantial majority of Gunnison Valley citizens, who are paying taxes to support the Water District's activities, are as opposed to building more dams within the Valley as they are opposed to Union Park and trans-mountain diversion itself.

* The need to operate the Aspinall Unit to meet the natural water flow requirements of the Black Canyon National Monument as defined by its charter and, thereby, to guarantee the preservation of the Monument's unique identity and to protect endangered species of fish.

If you agree with the Steering Committee of POWER that Colorado River issues will do more to impact the future of Colorado, the Western Slope and the Upper Basin of the Colorado River than all others, we invite you to join us in continuing our up-hill battle. Your membership, your encouragement, suggestions and criticism, together with your continued financial support will enable us to carry on. Thank you.

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See Seabrook letter to PCK of 1998

As developers, water managers, and politicians in Colorado continue to discuss plans for trans-mountain diversion as if there were no conflict between those plans and the Colorado River Compact, they run the grave risk of provoking Lower Basin states--which cannot afford to lose water required by the millions of citizens who inhabit the Great American Desert-- to demand all of the Colorado River water that the River Compact allots them--and, likely, much more.

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If you agree with the Steering Committee of POWER that Colorado River issues will do more to impact the future of Colorado, the Western Slope and the Upper Basin of the Colorado River than all others, we invite you to join us in continuing our up-hill battle. Your membership, your encouragement, suggestions and criticism, together with your continued financial support will enable us to carry on. Thank you.

1

WLR 240-2139

POWER
P.O. Box 59
Gunnison, CO 81230

March 5, 1999

Mr. Peter Evans
Acting Director
Colorado Water Conservation Board
Department of Natural Resources
721 Centennial Bldg.
1313 Sherman Street
Denver, CO 80203

Mr. James Lochhead
Upper Colorado River Commissioner
Colorado Water Conversation Board
Department of Natural Resources
721 Centennial Bldg.
1313 Sherman Street
Denver, CO 80203

Mr. R. Eric Kuhn
General Manager
Colorado River Water Conservation District
201 Centennial Street, Ste 204
P.O. Box 1120
Glenwood Springs, CO 81602

Mr. Randolph Seaholm
Chief Interstate Streams Investigation
Colorado Water Conservation Board
Department of Natural Resources
721 Centennial Bldg.
1313 Sherman Street
Denver, CO 80203

Mr. Wayne E. Cook
Executive Director
Upper Colorado River Commission
355 S. 400 Street East
Salt Lake City, UT 84414

In re: *POWER's concerns regarding Colorado River Water Diversions*

Gentlemen:

Two members of POWER's governing board met with the Upper Gunnison River District's President, Mark Schumacher, and Manager, Kathleen Klein on February 23, 1999 to discuss the water shortages in the Colorado River Basin which POWER had called to the attention of The Upper Gunnison River Water Conservancy District, and others, in its memorandum of 11/18/98 and 2/12/99.

During the course of that discussion, POWER board members asked why all of the responses by

the Colorado River that it now enjoys and is entitled to, but, rather, to prevent such rights from being impaired by the reaction of Lower Basin states when they wake up to Front Range plans for additional diversion of Colorado water east without the approval of the parties to the Colorado River Compact and without approval of any court.

Lest anyone believe that this letter constitutes a withdrawal or retreat from the points that POWER has previously raised with the Upper Gunnison River Water Conservancy District, with Upper Colorado River Managers, and with others, let us briefly reiterate those points here:

(1) POWER believes that the Lower Basin states are entitled to up to 8,500,000 acre feet of water per annum under Article III (a) and (b) of the Compact.

(2) POWER believes that the water apportioned is to be measured at Lee Ferry, Arizona. Although the Compact does not so specify; read as a whole document, it requires it.

(3) POWER believes that Colorado River water described in Article III (a) and (b), together with water described in Article III (c) (when Article III (b) water is called for), must be delivered annually out of the Upper Basin to the delivery point, Lee Ferry, with a ten year mean of 85 million acre feet.

(4) POWER believes the Compact contains many ambiguous provisions, and the significance of this fact is that ambiguities supply ~~any party~~ parties seeking to amend the Compact with arguments to support their cases.

(5) POWER believes it would be reckless and irresponsible to provoke Lower Basin states by unilaterally appropriating more water out of the Colorado River than Colorado (both West Slope and Front Range) is entitled to by agreement with the Lower Basin States or by court decisions.

(6) POWER believes that the decisions made by Upper Colorado Water Managers, as to the amount of water Colorado can remove from the Colorado River Basin, is neither the final nor only word on the matter.

(7) POWER believes the Colorado Water Mangers have not given adequate consideration to the effect that serious, sustained drought can and will have upon Colorado's obligations to the Lower Basin states.

(8) POWER believes that Colorado's Water Managers have not given adequate consideration to the water rights of Indian tribes, rights which are bound to materialize as large claims upon Colorado River water.

(9) POWER believes that, even if it appears that Colorado is not using all of the allotments granted to it by the Colorado River Compact, it should not consume all of those allotments, but save enough in reserve to be able to fulfill down-stream entitlement when the inevitable calls are made. Only such prudence will hold at bay efforts by Lower Basin states to amend the Colorado River Compact and grab for themselves even more Colorado River water than they already use.

(10) POWER will not be diverted from its attempts to advise the people of Colorado about water

Colorado Water Managers to POWER's letters have assumed that POWER meant to attack the integrity of Water Managers and/or to challenge Colorado's legitimate claims to water in the Upper Basin of the Colorado River.

To our surprise, Mr. Schumacher and Mrs. Klein both explained that River Managers believe that POWER's purpose in these memos is to start a process of amending the Compact in favor of the Lower Basin states and against Upper Basin states - Colorado in particular.

If this is the belief held by the Upper Colorado River Managers, it is mistaken. To the contrary, POWER's purpose is to prevent the state of Colorado from acting in a manner that will provoke California, and the other Lower Basin states, to try to amend the Compact in a way that will do irreparable damage to most water users, and all citizens, of Colorado. Do not think that POWER has come to impare the Law of the River, or the Compact; it has not come to destroy them, but to fulfill them.

If consumption of water within Colorado — to include further diversion of Colorado River Basin water east over the Continental Divide — does indeed provoke California and other Lower Basin states to use the Colorado River Compact in a manner suggested by POWER in its memos to the Upper Gunnison Water District, then Colorado may be required by law to shut off water that its users cannot afford to lose and be forced by federal decree to assume reparation debts that its citizens cannot afford to pay.

Let me assure you that POWER's purpose is not to challenge Colorado's rights to the water of

issues with profoundly affect their welfare. We intend to continue our efforts to persuade Front Range, as well as Western Slope users, and legislators, that Colorado water policies and practices need to be administered in the best interest of ALL Coloradoans, not just some. We genuinely hope to cooperate with Colorado Water Managers in pursuing this goal.

POWER is a group of citizens concerned with:

1) protecting Upper Basin states' water,

2) protecting Colorado's share of Upper Basin states' water, and

3) protecting Gunnison Basin water against the adverse affects of out of basin water divisions.

It does not claim to be all-knowing in matters of the Colorado River, but the tenacity and vigor with which you gentlemen have forwarded your opposition persuades us that we are on to issues of historic significance.

POWER's Board of Directors pledges to you that, in its future dealings with Colorado citizens (to include the Colorado River Managers), it will endeavor to be ~~as~~ civil and professional ~~as is humanly possible.~~

Sincerely yours,

POWER

by: P.C. Klingsmith, Chairman

P.O. Box 59

Gunnison, CO 81230

xc: Rep. Russell George

Sen. Ray Powers

Gunnison County Board of Commissioners

Hinsdale County board of Commissioners

Saguache County Board of Commissioners

POWER Steering Committee

Dick Bratton, 550

David Baumgarten 550

Charlie Piggott 550

the Editor
~~DRAFT~~
Gunnison Courier

Final
~~DRAFT~~
OUT

Ten yeas ago it seemed to many that the Upper Gunnison District would soon make a deal for transmountain diversion - with Aurora or with Arapahoe County or even begin its own project to provide water the Front Range. ~~The District needed money to build dams to develop its conditional water rights~~. A deal for transmountain diversion has been the traditional way in Colorado of getting money to finance such projects. Ramon Reed was an original member of POWER. He and other POWER members said loudly and often to the District, "No! Not one drop over the mountain. No deals!" Since Reed has been on the District Board, he strongly defended this position - often in the minority, sometimes as a minority of one.

Reed does his homework. Then he asks tough questions beginning with "Why?" and "How much?" He needs to. ~~Agricultural water users control more than 95% of the water in the Upper Gunnison Basin but pay less than 2% of the property taxes supporting the District's operations and its projects.~~ Why does agriculture need more water? How much will it cost and who is really going to pay for this water and who really will benefit down the road? How much water do developers want, where will they get it, and will they pay what it costs? Reed checks bills and details of plans. He speaks up so that all taxpayers receive their money's worth from lawyers, consultants, and even public water officials.

Water is said to flow towards money. Much money can be made from controlling water. We need someone looking out for all the many local interests in water and for the District's taxpayers. We need someone searching for simple cost-effective solutions to water problems, not grandiose schemes. We need someone committed to keeping what our basin was promised - and has received at no cost for 38 years. This is freedom from burdens, costs, and hassles of downstream calls for all local water users - agriculture, domestic, commercial, recreational, and industrial - by the way Aspinall Unit reservoirs are operated.

We need Ramon Reed to continue speaking out on the Upper Gunnison District Board. He deserves your vote and encouragement!

Gunnison Basin POWER

Elvis Reed -

GUNNISON COUNTY BOARD OF COMMISSIONERS
REGULAR MEETING AGENDA

DATE: TUESDAY, JUNE 15, 1999
PLACE: COMMISSIONERS MEETING ROOM
TIME: 8:00 A.M.

8:00 a.m.	o	Call to Order
	o	Agenda Review
8:15	o	Review of Airport Environmental Assessment
10:15	o	R & D Leasing Transfer of Airport Lease
10:30	o	BREAK
10:45	o	Pete Klingsmith Request to Discuss Water Shortages in Colorado River
11:05	o	Manning Ranch Land Use Change; Adopt Resolution
11:15	o	Pritchett Land Use Change; Adopt Resolution
11:25	o	Ley-Z-B Liquor License Modification of Premises
11:30	o	Treasurer's Report from April 1999
11:40	o	County Attorney Reports and Miscellaneous Contracts • Baxter Gulch Update • Resolution Clarifying Exempt Status of Parcel at Char-B Resort • Silver Sage Agreement to Extinguish Utility Easement
12:15 p.m.	o	County Manager Reports • C.A.S.T. Meeting Report • Remote Computer Site in Crested Butte • DA Funding Request Meeting Report • Regional Forester Lyle Laverty July Visit to Gunnison County • Library Board Request for Legal Assistance in Researching Sales Tax Issue • Schedule Board of Equalization Meetings; July Meeting Schedule
1:15	o	BREAK
1:30	o	Buckhorn Ranch: Review of Planning Commission Response to Board of Commissioners Resolution #1999-8; A Resolution Finding Reason For, and Directing the Planning Commission to Perform Additional Review and Reconsideration of the Final Plan for Filing 2A of Buckhorn Ranch
4:00	o	BREAK
4:15	o	Commissioner Comments
	o	Minutes Approval of May 18 Meeting
4:45	o	Unscheduled Citizens
5:00	o	ADJOURN
7:00 p.m.	o	**PUBLIC HEARING on BLM Wilderness Proposal**

NOTE: This agenda is subject to change, including the addition of items up to 24 hours in advance, or the deletion of items at any time. All times are approximate. For confirmation of the agenda or for further information, contact the County Manager's office at 641-0248. The County Manager and County Attorney's Reports may also include administrative items not listed. If any special accommodations are necessary, contact 641-0248 or TTY 641-3061 prior to the meeting.

Ralph E. Clark III
519 East Georgia Ave.
Gunnison, Colorado 81230
tel. 970-641-2907

February 22, 1999

Mark Schumacher, President
Board Members, Manager, and Attorneys
Upper Gunnison River Water Conservancy District
275 South Spruce Street
Gunnison, Colorado 81230

Dear President, Board Members, Manager, and Attorneys:

The District should drop its proposed Monarch No. 5 Reservoir now. It does not make sense.

On December 31, 1998, the District applied to the Water Court to allow the District to change the uses of its conditional water rights and to transfer them to where they would be developed. This application set out the District's plans. Are the District's plans serious?

The centerpiece of the District's new plans is building a reservoir far up Tomichi Creek called Monarch Number 5. The dam would be 200 feet high and the reservoir would store 12,000 acre-feet of water. Blue Mesa Dam is 302 feet high and stores 941,000 acre-feet. The District's engineers estimate Monarch No. 5 would cost $144,560,000 to build or $12,046 for each acre-foot of capacity. Union Park Reservoir is now estimated to cost $1.6 billion for 900,000 acre-feet of storage, or only $1,777 per acre-foot of capacity.

Some reasons given for building Monarch No. 5 and some facts:

* It is needed to stop transmountain diversion from the Tomichi Valley. Fact --- There is simply no water available for a new transmountain diversion from the valley. The whole of the Tomichi Valley has three times the irrigated acres of the East River Valley; the Tomichi Valley has three times the quantity of water decreed by water rights, and the Tomichi Valley produces only <u>half</u> the amount of water as the East River Valley. If water isn't available from the East River for Union Park, it surely doesn't appear available from the Tomichi Valley. The District's engineers said a reservoir on the upper Tomichi Creek would only fill in wet years. Water usually isn't needed then. Neither the presently decreed water rights nor the available supply of water in the Tomichi Valley justifies the Monarch No. 5 reservoir or transmountain diversion.

* Somebody wants to develop more water. Certainly, someone always does, but who? How much would they pay; how much do they expect others to pay? Would they go for the best deal? Fact --- Each acre-foot of water from Monarch No. 5 would cost upwards of $860. Tap water in large quantities from the City of Gunnison now costs about $488 an acre-foot.

* Monarch No. 5 would provide water in late summer to ranchers, preserve open space, and more water in the stream. Fact --- The whole Tomichi Valley, including Cochetopa and Quartz

Creeks, has 24,000 acres of irrigated land. If each irrigated acre in the valley were bought at $3,000 *an acre* for open space (but at a homesite price), the cost would only be $72 million - half the cost for Monarch No. 5. Wetlands in the Tomichi Valley already provide support to late season flows equal to the potential of Monarch No. 5 and do this at no cost.

* Monarch No. 5 is now the centerpiece of the District's plan because in 1991 the Water Court told the District to transfer its water rights to where they would be put to use. Indeed, the District was told to transfer its rights. In 1991 the District told the Court that the Upper Gunnison Project had many integrated features. The Water Court told the District that after 35 years of studies about what to do with its rights, the District had laid an adequate foundation for completing those features presented which the District found most viable and feasible. The District was also told to narrow the scope of its project to those presented features most likely to be constructed in the reasonably forseeable future - and to make appropriate transfers of its water rights to those features. Fact --- The District didn't do this.

Monarch No. 5 is neither feasible nor economically viable. To change ideas isn't bad, but the new ideas should make more sense - financially, physically, environmentally, practically, and legally - not less sense. There are much more sensible ways to use the District's conditional water rights - ways that cost little and achieve more. There are even ways for the District to let anyone who really wants water for their private use to step on up and pay the costs, fully and fairly, for what they expect to receive. The District appears to be simply on a "wild dam chase" at taxpayer's expense. The District should reconsider, plan to do something more sensible, and not waste more money. The District should drop Monarch No. 5.

The National Park Service recently proposed to settle the quantification of its reserved water rights for the Black Canyon National Monument by claiming all flows unappropriated as of March 2, 1933, with subordination to water rights prior to November 13, 1957, or to be co-equal with the Aspinall Unit water rights. The District has already conveyed its water rights for the second filling of Taylor Reservoir to the federal government. It could do the same with its conditional rights for the Upper Gunnison Project in return for the Monument's subordination to all in-basin water rights prior to January, 1, 1999. The District's rights could also, or concurrently, be committed to salinity control downstream in the Colorado River Basin. The District should then be compensated for the economic value of its water being used for this purpose - $300 to $500 an acre-foot per year. Both ideas seems more sensible than Monarch No. 5.

Respectfully:

Ralph E. Clark III
as a water user in the Tomichi Valley,
tax payer, and very concerned citizen

c: others

This letter goes to the UGRWCA and the 3 counties -

POWER \ Compact 4a. 99

3/6/99

Re / Response to the

NOTES ON EVANS AND LOCHHEAD'S LETTER of 1/25/99

and Mr Kuhn's letter 3/4/99, concerning

TO THOSE WE WROTE THE COOK LETTER TO (SEE FILE TAB)

Re: Colorado River water shortages

call Pete after 3 PM

Ladies and Gentlemen:

In this letter, we will refer to Mr. Evans and Mr. Lochhead as E&L, to the Upper Basin states as UBS, and to the Lower Basin states as LBS. "Water Managers" refer to those Colorado officials charged with protecting Colorado's share of Colorado River water, and MAF is short for million acre feet of water.

I.

Contrary to the argument of E&L and Mr. Kuhn, III(b) of the Compact is not the only, nor even the major argument, of POWER. Please refer to our letter of 2/12/99 regarding Mr. Cook's letter of 1/8/99 and letter to the Colorado Water Managers of 3/05/99.

At pages 1-3 of E&L's letter of 1/25/99, the authors contest POWER's assertion that the UBS can not claim water that the LBS withdraw below Lee Ferry to satisfy UBS delivery requirements under Art. III(a) and (b) (see AZ vs CA, p.18 of SO/50) They apparently believe that since the Colorado River system is the **entire** river in the U.S., Art. III(a) and (b), water can come from ~~and be allocated to~~ the flows of lower tributaries, including tributaries. They are wrong. Two problems arise with this claim, which are: (1) The lower basin tributaries do not often, if ever, produce 8.5 MAF per annum. In such an annual event, the LBS ~~(obtain facts)~~ could call for the shortage to be made up from UBS flows, for example, presumably to be measured at Lee Ferry (Compact Art. III (a) and (c)); (2) if the UBS were required to release to the River, 2 to 5 MAF per annum for a given 10 year period, to make up LBS tributary flow shortages, would the UBS be required to furnish additional water under Art. III(d), over and above the quantity required, to satisfy the annual shortages above noted?

Apparently, E&L believe that the UBS have no duty under Art. III(a) and (b) to furnish water to the LBS on an annual basis, or at all. See their letter, pg. 3, par. 2. What is said further on that page, to support this assertion, is mumbo-jumbo. In fact, they deny, by basically ignoring its meaning, that Art. III(b) is to be given ~~no~~ any effect at all! — and be credited against U.BS. delivery requirements at Lee Ferry

need a separate section for implications of transmountain diversion - or put it in Section I / go to

allocated - charged against

E&L's argument, that the 1 MAF required to be delivered under Art. III (b), if called for, did not have to be measured at Lee Ferry, but could be appropriated from a down-stream tributary. This argument could just as logically be made applicable to the 7.5 MAF stated in Art. III (a). In addition, if the lower tributaries did not produce 8.5 MAF each year, the LBS might well call on the UBS to let that amount of shortage flow down.

The difficulty with this is, the UBS would still have the duty to provide 75 MAF on a 10-year moving average without being credited with the 8.5 MAF, if you believe the Pontius (1997) study, not measured at Lee Ferry under the Manager's interpretation of Art. III (a) and (b).

If there is less than 7.5 or 8.5 MAF available to the LBS in any one or more annual periods, do the Managers think that the LBS could not call for their shortage be supplemented by an increased flow to at least 7.5 or 8.5 MAF at Lee Ferry (E&L letter, p. 2, par. 2, 3, and 4)? POWER would not like to see Colorado forced to argue this point before a federal referee or judge.

Further, if not final, proof that the UBS can not count on flows from downstream tributaries to supply Art. III(a) and (b), entitlements to the LBS is found in Arizona vs. California 373US546, as noted by E&L at page 3, the Court held that the LBS were entitled to 7.5 MAF per year (8.5 MAF if called for) per year from the mainstream of the Colorado River, while leaving the rest of the lower tributary's to each state (AZ vs CA, p.18 and 20 of 50). To the extent that the Court had jurisdiction in that case, POWER submits that the UBS have an absolute duty to release, each year, 7.5 to 8.5 MAF at Lee Ferry, and can not rely on any part of this water ~~flow~~ quantity requirement to be supplied by any lower basin tributary (see Pontius, 1979). This rebuts E&L's position that some or all of Art. III (a) and (b) water can come from lower basin tributaries which are indeed, as we have been reminded again and again, a part of the Colorado River system.

Special Master Rifkin confesses that Art. III(a), and, by association, III(b), is considered by Congress as a source of supply and not merely a ceiling on LBS appropriations. POWER prefers to adopt Congress' interpretation of the Colorado River Compact, to that of the Master (see p. VIII, 6) and so should the state of Colorado. The Master's report was not adopted by the Court in AZ vs CA, p. 23 of 50, nor has it been later, as far as we can determine.

E&L write, on p. 4, that in the last 8 years, no LBS has

called for an added 1.0 MAF under Art. III(b). Perhaps not. Perhaps contrary to what Pontius (1997) reported, and what Art. III(b) states, the LBS will be content to make do with what they are now receiving. Colorado, and its fellow UBS, should not discontent, or upset, the LBS by diverting additional water from the Basin, but rather should use their diplomatic efforts to continue the status quo which E&L claim does not require the delivery of 1 MAF under Art. III (b).

II. MEXICO

E&L should not misquote POWER regarding Mexico's entitlement under its treaty with the U.S. as they did on p.5 of their Jan. 25th letter. They erred twice in this regard. POWER did not state that Mexico had been, or was being, shorted, nor that the UBS " must always" provide one-half of the treaty obligations. The correct stance for Colorado to take is clouded and obfuscated by its Water Managers creating out of whole cloth attributions to POWER that POWER was innocent of making. They should also avoid publishing rosy reports as to the amount of Colorado River water available for transmountain diversion, thereby encouraging greedy and avid developers, on the Front Range, to go for the gold ring.

III. DROUGHT

E&L should address POWER's concerns in the following areas which they have glossed over in their letter of 1-25-99.

If a severe drought occurs, what plan, if any, does Colorado have in place, or envisage, to provide the Lower Basin States with 7.5 or 8.5MAF of water per annum (Art. III (a) and (b), Compact), or 75M ~~ac.~~ ft. for a 10 year consecutive period (Art. III (d) and with whatever water to which Mexico may be entitled (up to 0.75 MAF, Art. III(c)) starting with the ~~first~~ year of the drought? To some extent, the Upper Basin States take the risk for drier years (the Law of the Colorado River, p. 3, Bill Swan; Compact, III (d)), and Colorado should not rely on being relieved of this obligation.

For E&L merely to describe the LBS entitlement (their pages 2 and 3) is not addressing the potential drought problem. Or do ~~they~~ not think such a problem may exist?

IV. INDIANS

POWER also is concerned about Indian claims and whether, and how, their claims of entitlement will be satisfied. The Indian problem was not satisfied and settled at Wounded Knee or Sand Creek, nor entirely by AZ vs CA. It was addressed in the Compact (Art. VII) and both the U.S. and the Colorado Supreme Courts have held such claims to water, whatever they turn out to be, will be given precedences. Unless all of the Indian tribes, which may be entitled to Colorado River water, were made parties in the Arizona vs. California cases, those not represented are not bound by the decision; meaning, they could call on the Upper Basin States to provide their entitlements which could be more than 2 MAF, and as much as 5+ MAF. With priority dates, mostly senior to the Compact, these rights supercede the Compact rights, and would be in addition to the specific downstream releases called for by the Compact.

E&L's comments concerning Indian tribes on page 6 of its letter, are plausable, and we note E & L's facility in making them. E&L state that Indian claims are to be satisfied by Lake Mead waters. But this is not in AZ vs CA 373US546 (see 3T6US 340. 3/9/64). However, the problem requires much further study and agreement, or judicial promulgation, before water can be withdrawn from the Colorado River basin in confidence that it will not have to be relinquished later - once again, at great cost and expense.

Certain Indian tribes have 1MAF± quantified by the U.S. Supreme Court, 373US546. How much more will be set aside is up for grabs, but it looms on the horizon along with certain reserved rights of the national forests, parks, and other recreational areas. Must an Indian claim below Lee Ferry be satisfied from waters of Lake Mead or, if there is a shortage there, can they call for UBS releases? POWER believes that the latter would be the decision.

V. UNRESSOLVED CLAIMS

E & L apparently believe that the Compact (and the Law of the River) is written in stone. It surely is not; many ambiguities and uncertainties exist. To rely on the belief that the road ahead is clear for Colorado to consume an additional 450,000 ac. ft. per annum is a recipe for disaster. The UBS' growth and demand for water, as well as Mexico's current (1996) demands for their full 1.5 MAF to be delivered at Morales Dam (see Pontius, 1997, p. 69)., should not be ignored. Briefly, the

Compact itself provides that it can be reopened (Art. III (f), (g), and IX). , the Managers should Read these sections carefully.

VI. Perfected Rights the UBS & LBS

If the quantity of the perfected rights in both entitlements are added to the Compact ~~of the rights of~~ the LBS, ~~(plus the lower basin [illegible] of flows)~~ a dramatic shortage of water the LBS can claim may well exist and which will have to be delivered

> bring para. 2 from P 6 ✓

~~VII~~ VI. ~~COMPACT REVISIONS~~

California, Arizona, and Nevada can complain that the Compact does not apportion the water equitably (Compact Art. I) - California has 56 Representatives in Congress, Colorado has only 5. The Lower Basin States have 3 Supreme Court Justices, the Upper Basin States have none. ~~We do~~ not want to have to fight these people, unless we have lots of money and like to lose. ~~Get real!!~~ They can ask for a decision concerning the relative importance of different beneficial uses - i.e., one ton of hay per acre of a value of $100, vis-a-vis 1 ton of strawberries of a value of $20,000±. Further apportionment can take place under Art. I and III (f) and (g), subject to Congressional approval. The "kicking the sleeping dog" reference that POWER made is apt. See E & L's letter p. 7. What Delph Carpenter wanted for the State of Colorado (E & L, p. 7) is what POWER would like to see for the Gunnison Basin and the entire Western Slope. Let's not sacrifice the Gunnison Basin water for the good (or bad) of the rest of the State.

POWER sees a problem raised by the first sentence of the Compact Art. VIII. POWER believes the LBS, and Mexico, may well be entitled to all the water described in Art. III (a), (b), (c), and (d) together with the water appropriated and decreed in California, Arizona, New Mexico, and Utah prior to the date of the Compact - referred to in the Law of the River as Perfected Rights (see Appendix X).

VIII ~~VII.~~ EMERGENCIES

POWER is concerned that insufficient thought has been given by the Colorado Water Managers to how to deal with the emergencies which will exist in the event of drought or other contingencies, particularly in view of Pontius' estimate that the Colorado River is already overallocated by 20-30% (Pontius, 1997, p. 14 ~~– see next page??~~ ; see also Mr. Seaholm's letter of 2/13/98, p. 2). Prudent people dealing with their own future set aside a portion of their income and their assets to tide them over in the event of sickness, old age, or other misfortunes. If we understand E&L's position, the presently "unused" Colorado entitlement to the Colorado River water, of approximately 450,000 AF, is available, and should be used, presumably on the Front Range of Colorado since that is where the present demand is. Those who spend every penny of their income, and mortgage their assets to satisfy their everyday wants, are deemed to be improvident. If Colorado spends all of its water entitlement on current consumptive projects, such actions will also be deemed negligent, improvident, anf unwise, and surely, surely, very costly.

Delph Carpenter gave warning of this trend, when he stated words to the effect that the first and fasted area to grow should not be permitted to hog the available water, and stifle growth in the underdeveloped areas.

~~VIII.~~ IX UNANSWERED QUES

Questions that we would ask that you address:

1) Where are the III(a), (b), and (c) Compact waters to be measured? Or do you ~~not~~ think they need not ~~to~~ be?

2) What does Art. III(b) mean to you? Don't refer to ~~Jan. 25th~~ letter, because we would have to ask the question again.

3) Are the Art. III(a) and (b) waters due to be delivered and allowed to flow downstream each year? Who manages, oversees, and monitors this, and from where?

4) E&L did not address what POWER preceives to be ambiguities in the Compact; i.e. Art. III(a) and (b), IV(c), VII, and VIII, and in the Law of the River. These should all be identified and cleared up before the present flow of the Colorado River is further diminished by transmountain diversion.

Sincerely,

POWER

by _____
P. C. Klingsmith

Pontius, D., 1997, Colorado River Basin Study. Report to the Western Water Policy Review Advisory Commission. The Commission, Denver, CO. 132 pp.

POWER\compact.99

STATE OF COLORADO

Colorado Water Conservation Board
Department of Natural Resources
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1313 Sherman Street
Denver, Colorado 80203
Phone: (303) 866-3441
FAX: (303) 866-4474

E & L

January 25, 1999

Board of Directors
Upper Gunnison River Water Conservancy District
275 S. Spruce
Gunnison, CO 81230

RE: November 18, 1998 letter from Gunnison Basin POWER concerning Colorado River Compact

Dear Board Members:

We have received the letter from the "Gunnison Basin People Opposed to Water Export Raids" (POWER) that you forwarded to us. POWER purports to believe that there is no further water available for use in Colorado under the Colorado River Compact. This conclusion is without foundation. POWER's arguments are based on self-serving misinterpretations of the Compact and an obvious disregard of its provisions and of other laws governing the Colorado River. Because such misinterpretations of the Compact can erode the protections it provides to so many water users throughout the State of Colorado, we appreciate the opportunity to clarify matters.

Interpretation of Article III(b) of the Colorado River Compact

POWER's major argument is based upon an interpretation of Article III(b) of the Compact that is contrary to the plain language of the Compact, its history, and all subsequent interpretations of the Compact. The basic apportionment of the Compact is made in Article III(a), which allocates 7.5 million acre-feet of beneficial consumptive use of water per year to each of the Upper and Lower Basins. POWER argues that Article III(b) "allows the Lower Basin **to call upon** an additional 1,000,000 acre-feet per annum for beneficial consumptive use," (emphasis added), and that, "The Compact does not provide that the Upper Basin States may lay claim to waters flowing into the Colorado River from streams such as the Virgin and the Gila Rivers in Arizona or at other sources below Lee Ferry: therefore these waters may not be counted to make up the amount apportioned to the Lower Basin States under Article III (a) (b) (c) or (d)." POWER's assertions are wrong and incompatible with explicit provisions of the Compact and the laws governing the Colorado River in several significant respects.

First, POWER, in its apparent zeal to prevent transbasin diversions, has ignored a crucial definition set forth in Article II(a) of the Compact: "The term 'Colorado River system' means that portion of the Colorado River **and its tributaries** within the United States of America." (Emphasis added.) The apportionments made in Articles III(a) and (b) are made from the

"Colorado River system," which includes all tributaries, whether in the Lower or Upper Basins. The copy of the Compact attached to POWER's letter unfortunately omitted the opening two articles of the Compact: we attach a complete copy of the Compact for your information.

Second, there is nothing in Article III(b) which gives the Lower Basin "a right to call." The only guarantee of delivery to the Lower Basin is set forth in Article III(d), which -- unlike Article III (a) & (b) -- imposes a specific obligation on the Upper Division States not to deplete flows at a specific point (Lee Ferry) below a specific measure ("an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series").

Accordingly, POWER's major argument is contradictory to the plain language of the Compact. No further analysis should be required. Because representatives of POWER have disregarded repeated efforts to inform them of the plain language of the Compact (see attached February 13, 1998 letter from D. Randolph Seaholm to Peter C. Klingsmith), we are providing additional support from the history and interpretation of the compact which further rebuts POWER's arguments.

First, the minutes of Compact negotiations show that the only delivery obligation intended was that set forth in Article III(d), which was a separate matter from the apportionments made in what became Article III(a) and (b). Discussing Article III(d), Judge Davis, the commissioner for New Mexico, stated, "This is not a division, - we are not dividing the waters, we are guaranteeing water." Minutes of 17th meeting, p. 11. The Upper Basin commissioners originally proposed a guaranteed delivery of 65 million acre-feet in ten years and adamantly refused to increase the amount to 82 million acre-feet, as proposed by the Lower Basin, because "we have already experienced ten years in which it would have been impossible for us to comply." Statement of S.B. Davis, Minutes of 17th meeting, p. 14. POWER's interpretation, which would require a delivery of 85 million acre-feet every ten years, is contrary to the history of the negotiation of the Compact.

The commissioners were consistent in their later interpretation of these provisions of the Compact. Herbert Hoover, the Chairman and the federal compact commissioner, responded to a question from Carl Hayden, representative from Arizona, about the use of the term "Colorado River system":

> This term is defined in Article II as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the

> waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt.

Extract from Congressional Record, January 30, 1923, pp. 2710-2713, reprinted in The Hoover Dam Documents, H. Doc. No. 717, 80th Cong. 2d Sess. (1948) at A33. Later in the same exchange, Hoover described Article III(d) as meaning that, "The lower basin has the first call on the water up to a total use of 75,000,000 acre-feet each 10 years." Id. at A34. Delph Carpenter, commissioner for Colorado, stated succinctly that, "The compact is satisfied by an aggregate delivery of 75,000,000 acre-feet during any 10-year period." Id. at A79. Hoover also said:

> By the provisions of paragraphs (a) and (b), Article III, the lower basin is entitled to the use of **a total of 8,500,000 acre-feet from the entire Colorado River system, the main river and its tributaries.** All use of water in that basin, including the waters of tributaries entering the river below Lee Ferry, must be included within this quantity. The relation is reciprocal. Water used from these tributaries falls within the 8,500,000 acre-feet quota.

Id. at A35.

Subsequent interpretations of the Compact have agreed that only Article III(d) imposes a delivery obligation, and the Article III(a) & (b) apportionments are to be satisfied from the entire Colorado River **system**, including lower basin tributaries. In Arizona v. California, 373 U.S. 546 (1963), the United States Supreme Court resolved the controversy "over how much water each [Lower Basin] State has a legal right to use out of the waters of the Colorado River and its tributaries." 373 U.S. at 551. The Court determined that Congress had created an apportionment scheme through the Boulder Canyon Project Act: "What Congress was doing in the Project Act was providing for an apportionment among the Lower Basin States **of the water allocated to that basin by the Colorado River Compact**. The Lower Basin, with which Congress was dealing, begins at Lee Ferry, and **it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the [Lower Basin] States**." 373 U.S. at 591 (emphases added).

The Court ultimately decreed basic apportionments of 4.4 MAF to California, 2.8 MAF to Arizona, and .3 MAF to Nevada -- a total of 7.5 MAF of mainstream water, while leaving the use of tributaries to each state. See Arizona v. California, 376 U.S. 340 (1964). The Court's decision was controlled by the Project Act and did not require interpretation of the Compact. The Court, however, was concerned (as was Congress in the Project Act) with making a comprehensive apportionment among the Lower Basin states. It is inconceivable that such a complete apportionment could be made without dividing up **all** the water to which the Lower Basin was entitled under the Compact, and yet the Court made no mention of any additional delivery obligation of 1 million acre feet, limiting its basic apportionment to what it described as, "the

average annual delivery of water at Lee Ferry **required by the Compact -- 7,500,000 acre-feet....**" 373 U.S. at 558-59 (emphasis added).

The Special Master appointed by the Court in Arizona v. California discussed the Compact in more detail, as background for his ruling. His discussion is well-informed and enlightening, and we have attached a copy of the relevant portion for your information. Of particular note, Arizona made arguments that Article III(b) imposed a delivery burden on the Upper Basin, which the Master unceremoniously rejected:

> Article III(b) cannot be stretched so far. Whatever may account for its segregation as a separate provision of the Compact, there is nothing to suggest that III(b) imposes an affirmative duty on the Upper Basin. Rather, it imposes for the benefit of the Upper Basin, a ceiling on Lower Basin appropriations, albeit that the Lower Basin is privileged to have a higher ceiling than the Upper Basin.

Updating the Hoover Dam Documents, p. VIII-5.

Arizona apparently regards the III(b) argument as settled by Arizona v. California. In the last decade, the states of the Lower Basin have, for the first time, begun to use water up to the limits of their apportionments from the Colorado River mainstem under Arizona v. California. (Contrary to the implication in POWER's letter, there have not been any historic shortages either to the Lower Basin or to Mexico.) After construction of the Central Arizona Project, however, California could no longer rely on use of Arizona's unused apportionment. Because of that pressure, and unprecedented growth in the Las Vegas area, California and Nevada began seeking ways to increase their reliable supplies from the Colorado. In 1991 the Upper Basin states, in a process initiated by Colorado, began talks aimed at satisfying the Lower Basin needs without violating the compact rights of the other states. These talks are still ongoing. Yet not once in almost eight years has any state or any party in any state in the Lower Basin argued that the Lower Basin has a right to make a III(b) call against the Upper Basin for an additional million acre-feet. To the contrary, all of the discussions have been based on the fact that, as Arizona wrote in a July 31, 1992 discussion paper, "[U]nder the Law of the River, the Lower Basin States receive 7.5 MAF of mainstream Colorado River water annually." P. 15.

Finally, section 602 of the Colorado River Basin Project Act of 1968 (43 U.S.C. § 1552) in a provision painstakingly worked out among all the basin states, sets priorities for releases from and storage in Lake Powell. This provision expressly states that it is promulgated "in order to comply with and carry out the provisions of the Colorado River Compact." Yet it provides for only: (1) releases to satisfy Article III(c) deliveries to Mexico; (2) releases to satisfy Article III(d) deliveries to the lower basin; and (3) storage to ensure that the upper basin can make the first two deliveries in the future. It also provides that water over and above the first three requirements, if there is any, may be released under certain conditions. There is no mention of releases to satisfy any obligation under Article III(b). If such an obligation actually existed, Congress would not

have enacted, and the Lower Basin states would not have consented to, legislation specifying the operation of Lake Powell which completely omitted consideration of such a factor. The fact is that Article III(b) imposes no delivery obligation whatsoever on the Upper Basin or on Lake Powell.

Thus, POWER's primary argument has absolutely no support.

Interpretation of Article III(c) of the Colorado River Compact

POWER also misstates the operation of III(c) regarding satisfaction of the Mexican treaty obligation. First, POWER erroneously suggests that Mexico has been shorted, and states that "representatives of the Colorado Water Conservation Board" have advised "that Mexico has not yet called upon its yearly entitlement." Mexico has consistently received its full entitlement of 1.5 MAF, and sometimes much more, as shown by International Boundary and Water Commission and Bureau of Reclamation documents, which we can provide upon request. No one from the Board would represent or has represented otherwise.

POWER also suggests that the Upper Basin must always provide one-half of the treaty obligation. This is not accurate, as shown by the complete text of Article III(c):

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters **of the Colorado River system**, such water shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and **if such surplus shall prove insufficient for this purpose, then** the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper basin shall deliver at Lee Ferry water to supply one-half the deficiency so recognized in addition to that provided in paragraph (d).

Like the other paragraphs of article III, III(d) speaks in terms of the Colorado River system, including Lower Basin tributaries. The Upper Basin obligation to deliver one-half the Mexican treaty obligation only applies if there is no surplus water in the entire Colorado River basin, considering all the Lower Basin tributaries. The total water supply of Lower Basin tributaries has been variously estimated, but is at least 2 MAF. Accordingly, there have been and will be years when the total supply of the Colorado River system is well over the combined apportionments made by the Compact. Because the Lower Basin consumes much more than 1 MAF of water from Lower Basin tributaries (so that total Lower Basin consumptive use consistently exceeds 8.5 MAF), the Upper Basin has taken the position that treaty shortfalls would have to be made up by surplus water from Lower Basin tributaries before any obligation would fall on the Upper Basin.

Effect of Claims by Indian Tribes

POWER also suggests that reserved water rights claims by tribes along the Colorado River "will predate and supercede most of the water rights existing in Colorado." This is contradicted by several provisions of the Law of the River. First, tribal claims in the Lower Basin are generally "present perfected rights," which, under Article VIII of the Compact, now "shall attach to and be satisfied from" water stored in Lake Mead. Second, paragraph II.B.4 of the Arizona v. California decree provides that "any mainstream water consumptively used within a State shall be charged to its apportionment." Paragraph I.C expressly states that, "Consumptive use from the mainstream within a State shall include all consumptive uses of water of the mainstream, . . . **including**, but not limited, to, consumptive uses made by persons, by agencies of that State, and **by the United States for the benefit of Indian reservations** and other federal establishments within the State." Third, Article VII of the Upper Colorado River Basin Compact similarly provides that, "The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made. . . " Thus, the only tribal claims which could affect Colorado's compact apportionment are those by tribes within the state: claims by tribes in other states would be satisfied out of those states' apportionments. The claims of the Ute Mountain Utes and the Southern Utes to the Dolores and San Juan River basins were settled pursuant to a 1986 agreement. These two tribes are the only tribes within the state of Colorado.

Unused Apportionment

POWER has asked the Conservancy District to encourage a declaration by the state legislature that there is no unappropriated water available in the Colorado River System. Again, POWER's request not only misinterprets the Law of the River (as stated above), but also disregards the facts. Unlike the Lower Basin states, the Upper Basin states agreed to an apportionment of the upper Colorado River. The Upper Colorado River Basin Compact (approved in 1948) apportions to individual states the Upper Basin's share of the water under the Colorado River Compact. Colorado is entitled to 51.75 percent of that water (after Arizona's 50,000 acre-foot share is subtracted). The U.S. Bureau of Reclamation recently determined that the hydrologic yield of the Upper Basin is 6 million acre-feet, which corresponds to a flow at Lee Ferry of about 14,250,000 acre-feet. (The estimated average virgin or natural flow at Lee Ferry since 1896 is 14,900,000 acre-feet.) Using the Bureau of Reclamation's estimate, Colorado's apportionment allows for approximately 3,079,125 acre-feet of beneficial consumptive use within the state. We believe this is a conservative estimate reasonably derived for water supply reliability purposes.

It is important for each of the seven basin states to observe and live within their compact apportionment in order to provide maximum protection to its water users and to avoid costly litigation and liability issues. We estimate Colorado's current consumptive use of Colorado

River water at approximately 2,300,000 acre-feet on an average annual basis. We also estimate that our existing infrastructure gives Colorado's communities, ranches, farms and businesses the capacity to consume about 2,629,000 acre-feet on an average annual basis. See Final Report, Colorado River Compact Water Development Projection Work Group, November 1995. Comparing these estimates of consumptive use to our estimated Compact apportionment and the total natural, or "virgin," water yield of the Colorado River basin within the State of Colorado (estimated to be 10-11 million acre-feet), we believe Colorado can safely plan on consuming approximately 450,000 acre-feet of additional water from the Colorado River basin.

Conclusion

We appreciate the opportunity to respond to POWER's arguments. Although POWER's tortuous reasoning does not merit detailed rebuttal, we have nevertheless provided as much information as possible because of the critical importance of proper interpretation of the Colorado River Compact.

The Upper Basin negotiated the Compact precisely because of fears that the Lower Basin States would develop faster than the Upper Basin States like Colorado. See The Hoover Dam Documents at A 92 (Report of Delph Carpenter). The whole purpose of the Compact was to preserve an equitable share of the river for the Upper Basin states:

> The apportionment to the upper territory is perpetual. It is in no manner affected by subsequent development. .... There can be no rivalry or contest of speed in the development of the two basins. Priority of development in the lower basin will give no preference of rights as against the apportionment to the upper basin.

Id. at A80 (report of Delph Carpenter). Yet POWER essentially argues that because of rapid development in California and Las Vegas, Colorado should not "kick the sleeping dog," by developing its full apportionment.

Delph Carpenter's explanation holds true today:

> Broadly speaking, from a Colorado viewpoint, the compact perpetually sets apart and withholds for the benefit of Colorado a preferred right to utilize the waters of the river within this State to the extent of our present and future necessities. It protects our development from adverse claims on account of any great reservoir or other construction on the lower river. It removes all excuses for embargoes upon our future development and leaves us free to develop our territory in the manner and at the times our necessities may require.

The Hoover Dam Documents at A81-A82.

The Compact protects both present and future water uses by all Coloradans. POWER's misrepresentations of the Compact could unnecessarily threaten and jeopardize uses of Colorado River water throughout Colorado, including uses within the Upper Gunnison basin. POWER appears willing to sacrifice the interests of all Coloradans to its self-serving theories. We strongly urge you to decisively reject POWER's assertions and their requested action.

Sincerely,

Peter Evans
Acting Director

James S. Lochhead
Upper Colorado River Commissioner

Attachments
Cc:
Rep. Russell George
Sen. Ray Powers
CWCB Members
Jennifer Gimbel
Carol Angel
Wayne Cook
Randy Seaholm
Gunnison County Board of Commissioners
Hinsdale County Board of Commissioners
Saguache County Board of Commissioners
Kathleen Klein
POWER Steering Committee
Dick Bratton
David Baumgarten

37-61-101. Colorado River compact. The General Assembly hereby approves the compact, designated as the "Colorado River Compact", signed at the City of Santa Fe, State of New Mexico, on the 24th day of November, A.D. 1922, by Delph E. Carpenter, as the Commissioner for the State of Colorado, under authority of and in conformity with the provisions of an act of the General Assembly of the State of Colorado, approved April 2, 1921, entitled "An Act providing for the appointment of a Commissioner on behalf of the State of Colorado to negotiate a compact and agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming and between said States and the United States respecting the use and distribution of the waters of the Colorado River and the rights of said States and the United States thereto, and making an appropriation therefor.", the same being Chapter 246 of the Session Laws of Colorado, 1921, and signed by the Commissioners for the States of Arizona, California, Nevada, New Mexico, Utah, and Wyoming, under legislative authority, and signed by the Commissioners for said seven States and approved by the Representative of the United States of America under authority and in conformity with the provisions of an Act of the Congress of the United States, approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.", which said compact is as follows:

Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact, under the Act of the Congress of the United States of America approved August 19, 1921, (42 Statutes at Large, page 171), and the Acts of the legislatures of the said states, have through their Governors appointed as their commissioners:

W. S. Norviel, for the State of Arizona;
W. F. McClure, for the State of California;
Delph E. Carpenter, for the State of Colorado;
J. G. Scrugham, for the State of Nevada;
Stephen B. Davis, Jr., for the State of New Mexico;
R. E. Caldwell, for the State of Utah;
Frank C. Emerson, for the State of Wyoming;

who, after negotiations participated in by Herbert Hoover appointed by the President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Article II

As used in this Compact: -

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governor of the signatory states and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the Legislative ratification of the signatory States and the Congress of the United States of America.

Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purpose of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.

Article V

The Chief Official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall co-operate, ex officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

Article VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

Article VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of waters in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Article X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

In Witness Whereof, The Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this Twenty-fourth day of November, A.D. One Thousand Nine Hundred and Twenty-Two.

W. S. Norviel,
W. F. McClure,
Delph E. Carpenter,
J. G. Scrugham,
Stephen B. Davis, Jr.,
R. E. Caldwell,
Frank E. Emerson.

Approved:
Herbert Hoover.

Source: L. 23: p. 684, § 1. not in CSA. **CRS 53:** § 148-2-1. **C.R.S. 1963:** § 149-2-1.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310, 373, 374.

C.J.S. See 81A C.J.S., States, § § 8, 31; 93 C.J.S., Waters, § § 5-8.

Law reviews. For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For comment, "Bryant v. Yellen: Perfected Rights Acquire New Status Under a Belated Clarification of Arizona v. California", see 58 Den. L.J. 847 (1981). For article, "The Law of Equitable Apportionment Revisited, Updated and Restated", see 56 U. Colo. L. Rev. 381 (1985). For article, "Competing Demands for the Colorado River", see 56 U. Colo. L. Rev. 413 (1985). For article, "Management and Marketing of Indian Water: From Conflict to Pragmatism", see 58 U. Colo. L. Rev. 515 (1988). For article, "Colorado River Governance", see 68 U. Colo. L. Rev. 573 (1997).

37-61-102. Compact effective on approval. That said compact shall not be binding and obligatory on any of the parties thereto unless and until the same has been approved by the legislature of each of the said states and by the congress of the United States, and the governor of the state of Colorado shall give notice of the approval of said compact by the general assembly of the state of Colorado to the governors of each of the remaining signatory states and to the president of the United States, in conformity with article XI of said compact.

Source: L. 23: p. 693, § 2. not in CSA. **CRS 53:** § 148-2-2. **C.R.S. 1963:** § 149-2-2.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310.

C.J.S. See 81A C.J.S., States, § § 8, 31.

37-61-103. Approval waived. That the provisions of the first paragraph of article XI of the Colorado River Compact, making said compact effective when it has been approved by the legislature of each of the signatory states, are hereby waived and said compact shall become binding and obligatory upon the state of Colorado and upon the other signatory states, which have ratified or may hereafter ratify it, whenever at least six of the signatory states have consented thereto and the congress of the United States has given its consent and approval, but this article shall be of no force or effect until a similar act or resolution has been passed or adopted by the legislatures of the states of California, Nevada, New Mexico, Utah, and Wyoming.

STATE OF COLORADO

Colorado Water Conservation Board
Department of Natural Resources
721 Centennial Building
1313 Sherman Street
Denver, Colorado 80203
Phone: (303) 866-3441
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February 13, 1998

Mr. Peter C. Klingsmith, Attorney
Gunnison Basin POWER
P.O. Box 1742
Gunnison, Colorado 81230

Dear Mr. Klingsmith,

Thank you for your letter of January 8, 1998 concerning the state of Colorado's position on Article III(b) of the Colorado River Compact. Article III(b) provides that the Lower Basin may increase its beneficial consumptive uses by 1,000,000 acre-feet per annum from waters of the Colorado River System. In order to address your question, Article III, paragraphs (a) to (e) of the compact and the terms defined in the Compact must be read together. The pertinent sections are as follows:

Colorado River Compact

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any water of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten

consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) *The states of the Upper Division shall not withhold water, and the states of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.*

Critical to your question is the definition of the term, "Colorado River System" which is defined in Article II(a) of the Colorado River Compact as follows:

"The term 'Colorado River System' means that portion of the Colorado River and its tributaries within the United States of America."

Additionally, there are two major factual reasons that the Lower Division States can not seek any additional water from the "Upper Basin" under paragraph III(b). The first reason is that there is not enough water in the mainstem of the Colorado to satisfy the apportionments made under paragraph III(a) most of the time. The progressive 10-year moving average virgin flow at Lee Ferry has not exceeded 15.0 million acre-feet since 1934, except during the 1983-1993 period. Also, the estimated virgin flow average since 1896 is only 14.9 million acre-feet.

Secondly, the negotiators of the compact looked at the entire "Colorado River System" in making the apportionments thereunder. The Lower Basin has already taken the additional water and then some from the Colorado River tributaries. The "Consumptive Uses and Losses Report" prepared by the U.S. Bureau of Reclamation every five-years shows consumptive uses for the state of Arizona alone range between 4.0 and 6.3 million acre-feet annually, which is well in excess already of the additional water apportioned to the Lower Basin in Article III(b). Furthermore, this does not even consider uses made by those portions of Utah and New Mexico that are also part of the Lower Basin.

In other words, the allocations in Articles III(a) and (b) are made from the mainstem of the Colorado River and its tributaries, including Lower Basin tributaries such as the Gila River in Arizona and the Virgin River in Utah, Arizona and Nevada. In contrast, Article III(d) applies only to flows in the mainstem at Lee Ferry. Therefore, the right of the Lower Basin to increase its consumptive use by 1,000,000 acre-feet pursuant to Article III(b) refers only to Lower Basin tributaries. It does not authorize the Lower Basin to call for more water at Lee Ferry. This is clear from a plain reading of the Compact, as well as extensive background in the negotiations and subsequent events. For example, Arizona refused to ratify the compact until 1944 precisely because Article III(b) would limit its consumptive uses on the Gila River.

not accord with the clear language of III b

Given these facts, it is extremely unlikely that the Lower Basin will ever make an issue out of Article III(b) and even more unlikely that they could ever prevail on the issue in a court of law.

I hope this addresses your concerns relative to Article III(b) of the Colorado River Compact.

Respectfully,

D. Randolph Seaholm

D. Randolph Seaholm
Chief, Interstate Streams Investigations

Cc:
Colorado Water Conservation Board Members
Manager, Upper Gunnison River Water Conservancy District

APPENDIX VIII - ARIZONA v. CALIFORNIA

801 - Special Master's Analysis of Compact

802 - Special Master's Decree Recommended to Supreme Court

801

PARTIAL DOCUMENT
Special Master's Analysis of Compact

I therefore conclude that the provisions of the Compact, unless made operative by relevant statutes or contracts, do not control the disposition of this case. Nevertheless, in view of the urgent arguments of the sovereign parties and against the eventuality that the Court may take a different view of the matter, I set forth my views regarding the meaning of some provisions of the Compact.

The limits established by the Compact on the acquisition of appropriative rights are applicable to the mainstream of the Colorado River and to its tributaries. Arizona has contended otherwise, claiming that the Compact relates to the mainstream exclusively. To support this contention, Arizona advances a number of arguments:

1. That the events leading to the adoption of the Compact, already mentioned in this Report, reveal an intention to deal with mainstream problems rather than with problems on the tributaries;
2. That the Upper Basin could physically control and acquire rights, against the Lower Basin, in mainstream and Upper Basin tributary water only, and hence was not interested in Lower Basin tributaries;
3. That the Compact purports to apportion only part and not all of the water in the River System;
4. That the obligation specified in Article III(d) necessarily refers to mainstream water only;
5. That subdivisions (a) and (d) of Article III are correlative and that III(b) refers to additional mainstream water;
6. That Article VIII deals with mainstream water.

At best, these arguments suggest two things: (1) that some provisions of the Compact relate to mainstream water exclusively, and (2) that the Compact might have been limited to the mainstream in all of its provisions if the negotiators had chosen to have it so confined. However, the plain words of the Compact permit only one interpretation —that Article III(a), (b), (c), (f) and (g) deal with both the mainstream and the tributaries. Article II(a) states: "The term 'Colorado River System' means that portion of the Colorado river and its tributaries within the United States of America." Article III(a) apportions "from the Colorado River System . . . the exclusive beneficial consumptive use . . . of water." Article III(b) allows the Lower Basin "to increase its beneficial consumptive use of *such waters*. . . ." "Such waters" can only refer to System waters, that is, to mainstream and tributary water as defined in Article II(a). In Article III(c), (f) and (g) System water is specified by name.

The various arguments of Arizona fail before this unmistakable language of the Compact. The historical fact that the Upper Basin was primarily concerned with the mainstream will not nullify language of the Compact that subjugates both mainstream and tributaries to its rule. Nor is the argument persuasive that because some provisions deal only with the mainstream, all provisions are so limited. It is certainly true that the second sentence of Article VIII deals with the mainstream only. It very clearly says so. The preceding and the following sentences, however, speak of the Colorado River System, indicating the draftsmen's intent to distinguish the two terms.

Article I states that "an apportionment of the use of part of the water of the Colorado River System is made" by the Compact, and Article VI speaks of "waters of the Colorado River System not covered by the terms of this Compact". From this Arizona would have me infer that tributaries are not subject to the limitations of Article III(a) and (b). The provisions of Articles I and VI can be given full effect without thus overriding the plain language of Article II(a). Article I is consistent with Article III(f) and (g) which provides for further equitable apportionment of the use of System water. The 1922 Compact apportioned the use of 16,000,000 acre-feet of water to the two Basins; a later compact could make a "further equitable apportionment" of remaining System water. Article VI demonstrates that the Compact governs inter-basin and not interstate relations. If a controversy should arise, for example, between two Lower Basin states over the mainstream, or over a tributary, that Article provides for alternative modes of adjusting the dispute. As

between Lower Basin states "the waters of the Colorado River System [are] not covered by the terms" of the Compact. (Colorado River Compact, Art. VI(a); see Ariz. Exs. 46, 49.)

Lastly, Arizona argues that Article III(a) relates to the mainstream only because III(a) and III(d) are correlative, III(d) being III(a) multiplied by ten, and Article III(d) is clearly a mainstream measurement. This argument is unacceptable. Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. Since a substantial quantity of water is lost through reservoir evaporation and channel losses as it flows from Lee Ferry, the point where the III(d) obligation is measured, to the diversion points downstream from Hoover Dam, where most of the appropriations are made, 7,500,000 acre-feet of water at Lee Ferry will supply a considerably smaller amount of appropriations below Hoover Dam. Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantitative measurement of the flow of water at Lee Ferry.

The Compact does affect the supply of water available to the Lower Basin. Two provisions of the Compact relate to supply, Article III(c) and Article III(d). Article III(d) presents no questions of interpretation. Under it, the Upper Division states may "not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years, reckoned in progressive series beginning with the first day of October...."

With the storage provided by Lake Mead, and barring a drought unprecedented in the recorded history of the River, the Lower Basin has, under the guarantee of the Compact, available for use at Hoover Dam a minimum of 7,500,000 acre-feet of water per year, less transit losses between Lee Ferry and the dam, evaporation loss from Lake Mead, and its share of the Mexican treaty obligation.

The Compact provides for the delivery of water by the states of the Upper Division at Lee Ferry, in addition to the supply guaranteed by III(d), when the obligation to Mexico cannot be satisfied "from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b) [of Article III of the Compact]. . . ." In that event, "the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the states of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)" of Article III. At the time the Compact was signed (1922) and when it became effective (1929), the United States was under no treaty obligation to Mexico and the Compact created no obligation. However, in 1944 the United States and Mexico negotiated a treaty, proclaimed in 1945, under which the United States has the duty to deliver 1,500,000 acre-feet annually to the United States of Mexico at the international boundary.[13]

Several questions arise regarding the effect of Article III(c), and the parties have offered various suggestions regarding its interpretation. These questions include: (1) what is the meaning of the word "surplus"? (2) if surplus is not sufficient to supply Mexico, how should the Upper Basin's further delivery obligation be measured under the language of Article III(c)? In my judgment, the various questions advanced by the parties concerning construction of this subdivision ought not to be answered in the absence of the states of the Upper Basin; nor need they be answered in order to dispose of this litigation affecting only Lower Basin interests. Under the interpretation which I propose of the Boulder Canyon Project Act and the water delivery contracts made by the Secretary of the Interior pursuant thereto, it is unnecessary to predict the supply of water in the mainstream, in the Lower Basin, in order to adjudicate the present controversy.[14]

Arizona argues that Article III(b), relating exclusively to appropriations in the Lower Basin, imposes an additional delivery burden on the Upper Basin. She reasons that after the III(a) apportionment is exhausted, the Lower Basin may, under Article III(b), increase its uses by 1,000,000 acre-feet and that the Upper Basin is obliged to furnish water for this increased III(b) use, subject only to the Upper Basin's first right to 7,500,000 acre-feet of water under Article III(a).

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[13]This obligation is subject to several qualifications: the treaty is discussed *infra* at pages 295-296.

[14]Stream flow at Lee Ferry has historically exceeded the maximum delivery obligation under III(c) and III(d). Whether this condition will continue upon full development of the Upper Basin is a subject of dispute among the experts which need not be resolved here.

Historic stream flows at Lee Ferry were as follows:

TEN-YEAR TOTALS OF COLORADO RIVER WATER AT LEE FERRY (In Acre-Feet)

Ten-Year Period	Stream Flow in Acre-Feet	Ten-Year Period	Stream Flow in Acre-Feet
1896-1905	133.700.000	1923-1932	139.969.500
1897-1906	141.904.000	1924-1933	133.453.600
1898-1907	146.407.000	1925-1934	125.368.900
1899-1908	144.870.000	1926-1935	123.939.900
1900-1909	151.326.000	1927-1936	121.901.700
1901-1910	151.695.000	1928-1937	117.211.700
1902-1911	153.417.000	1929-1938	117.328.400
1903-1912	163.557.000	1930-1939	107.498.700
1904-1913	162.601.000	1931-1940	101.510.200
1905-1914	167.235.800	1932-1941	111.174.700
1906-1915	164.736.200	1933-1942	112.917.800
1907-1916	164.097.000	1934-1943	114.435.400
1908-1917	163.987.100	1935-1944	123.260.400
1909-1918	165.873.700	1936-1945	124.893.700
1910-1919	155.026.100	1937-1946	121.668.100
1911-1920	161.795.800	1938-1947	123.285.600
1912-1921	167.888.600	1939-1948	121.532.800
1913-1922	165.311.000	1940-1949	126.498.100
1914-1923	168.578.300	1941-1950	130.473.700
1915-1924	161.724.600	1942-1951	124.252.400
1916-1925	160.565.300	1943-1952	125.203.000
1917-1926	157.249.000	1944-1953	122.745.000
1918-1927	151.942.800	1945-1954	115.639.600
1919-1928	153.616.500	1946-1955	111.401.200
1920-1929	161.981.500	1947-1956	111.410.500
1921-1930	155.312.900	1948-1957	115.243.100
1922-1931	140.985.600	1949-1958	116.555.900

Article III(b) cannot be stretched so far. Whatever may account for its segregation as a separate provision of the Compact, there is nothing to suggest that III(b) imposes an affirmative duty on the Upper Basin. Rather, it imposes for the benefit of the Upper Basin, a ceiling on Lower Basin appropriations, albeit that the Lower Basin is privileged to have a higher ceiling than the Upper Basin.

It is my conclusion that Article III(b) has the same effect as Article III(a), and this conclusion is supported by the reports of the Compact commissioners, who spoke of III(a) and III(b) as apportioning 7,500,000 acre-feet to the Upper Basin and 8,500,000 acre-feet to the Lower Basin. (See Ariz. Exs. 46, 49, 53, 55, 57).

"Beneficial consumptive use" is a term used throughout the Compact although, regrettably, it is not defined in Article II or elsewhere in the document. In the early stages of the hearing, Arizona spent a vast amount of effort in seeking to establish the term as a word of art. She now contends that it has no special meaning and never did.

California argues that the term is used in the Compact as a word of art and means:

> "the loss of Colorado River System water in processes useful to man by evaporation, transpiration or diversion out of the drainage basin, or otherwise, whereby such water becomes unavailable for use within the natural drainage basin in the United States, or unavailable for delivery to Mexico in satisfaction of requirements imposed by the Mexican Treaty. The term includes but is not limited to incidental consumption of water such as evaporation and transpiration from water surfaces and banks of irrigation and drainage canals, and on or along seeped areas, when such incidental consumption is associated with beneficial consumptive use of water, even though such incidental consumption is not, in itself, useful."[15]

[15]Calif. Brief, Vol. II, p. A1-4.

Further refinements of this definition are contained in a 70-page brief, labeled Appendix 1 of California's Opening Brief. Other parties have contributed suggestions for construing the term.

As used in the Compact, beneficial consumptive use was intended to provide a standard for measuring the amount of water each Basin might appropriate. This was necessary since Article III(a) and (b) imposed limits on appropriative rights. In early applications of the western law of appropriation, diversions were regarded as the measure of water use.[16] By 1922, however, it was recognized that the amount of water diverted for irrigation purposes was not necessarily the amount consumed and lost to the stream. Some water applied to the ground would usually reappear in the stream as return flow. The term beneficial consumptive use as employed in the Compact was intended to give each Basin credit for return flow. Thus whether the limits fixed by Article III(a) and (b) have been reached or exceeded is to be determined by measuring the amount of each Basin's total appropriations through the formula, diversions less return flows. In the Compact, "beneficial consumptive use" means consumptive use (as opposed to non-consumptive use, *e.g.* water power) measured by the formula of diversions less return flows, for a beneficial (that is, non-wasteful) purpose. This understanding of the term is reflected in several of the commissioner's reports. (See Ariz. Exs. 46, 52, 54, 57.)[17]

As the foregoing discussion indicates, I regard Article III(a) and (b) as a limitation on appropriative rights and not as a source of supply. So far as the Compact is concerned, Lower Basin supply stems from Article III(c) and (d). There are, of course, other sources of supply, for example, Lower Basin tributary inflow, but these are not dealt with as supply items in the Compact. Thus when referring to the Compact, it is accurate to speak of III(c) and III(d) water, but it is inaccurate and indeed meaningless to speak of III(a) and III(b) water. For Compact purposes, Article III(a) and (b) can refer only to limits on appropriations, not to the supply of water itself.

It is true that Congress in Section 4(a) of the Project Act, treated Article III(a) as a source of supply rather than as a limitation on appropriations. The Act speaks of "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact...." Later in this Report I shall develop at some length the meaning of this language and the confusion it has produced in this litigation. Suffice it now to say that the congressional meaning is different from the Compact meaning. One may properly speak of III(a) water in the Project Act sense, but not in the Compact sense. Much of the confusion in this case may be traced to this difference between the two writings, for the parties speak of III(a) water without differentiating between the Compact and the Project Act.

One other contention relating to the Compact may be noticed here. Under Section 4(a) of the Project Act, California, in addition to consuming a part of the so-called III(a) water, may share in "excess or surplus waters unapportioned by said Compact." California contends that III(b) uses are unapportioned by the Compact. The argument is based primarily on the fact that Article III(b) does not use the word "apportioned" which appears in Article III(a). Article III(b) gives the Lower Basin "the right to increase its beneficial consumptive use of" water by 1,000,000 acre-feet per annum. I have already indicated my view that subdivisions (a) and (b) of Article III operate in identical fashion; that the net effect of the two sections is to limit appropriations in the Upper Basin to 7,500,000 acre-feet and in the Lower Basin to 8,500,000 acre-feet. That both sections effect an apportionment is made clear by Article III(f), which provides for "further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c)" of Article III. California argues that apportionment has no precise or consistent meaning in the Compact, since in the foregoing provision Article III(a) and (b) are lumped together with Article III(c) which, according to the argument, clearly does not apportion water to Mexico. California's argument has no merit. Article III(c), while apportioning no water to Mexico, does apportion the burden of a deficiency resulting from the Mexican obligation between the Upper and Lower Basins, and hence effects an apportionment. Moreover, as I have previously had occasion to observe, the reports of the Compact commissioners describe Article III(b) as an apportionment (See Ariz. Exs. 46, 49, 53, 55, 57).

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[16] See Hutchins, Selected Problems in the Law of Water Rights in the West 331 (1942).

[17] The term has since been adopted by branches of the engineering profession to express highly sophisticated formulae useful in the planning of irrigation projects. One such is the Blany-Criddle formula $U = KF - R$. For an explanation of this formula, see Tr. 13417—13428 (Criddle). Such meanings have no bearing on the term as used in the Compact.

By these observations I do not mean to rule on California's rights under Section 4(a) of the Project Act. That III(b) uses are apportioned for Compact purposes does not control the interpretation of the statute, and I shall discuss its interpretation in this regard later in the Report.

W Den Co Gas 2-17-99

M. Tezak - Montrose investor

CHAPTER II

UNITED STATES COLORADO RIVER WATER DELIVERY AND RELATED CONTRACTS

A. Background

The United States, acting through the Secretary of the Interior, has entered into Colorado River water delivery contracts under authority of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057. Section 5 authorizes such contracts and prohibits the use of stored water by anyone except by such contract. Prior to that, contracts were made under the Reclamation Act of 1902; water deliveries were made to lands in reclamation projects, such as the Yuma Project in Arizona and California, pursuant to water right applications filed by individual landowners; and diversions were permitted from such facilities (Laguna Dam); e.g., to lands in the North Gila Valley (Section 13(a) of the Project Act also approved the 1922 Colorado River Compact).

Contracts have been entered into with the State of Nevada, through its Colorado River Commission, dated March 30, 1942, I1r-1399, for the delivery of not to exceed 100,000 acre-feet of water per year for consumptive use (Article 5(a)). A charge of 50 cents per acre-foot is made during the Boulder Dam cost repayment period and, thereafter, the charge is to be on such basis as may be prescribed by Congress (Article 9). On January 3, 1944, a supplemental contract was executed in which the 100,000 acre-feet was raised to 300,000 acre-feet.

A contract has also been entered into with the State of Arizona dated February 9, 1944, for the delivery of a maximum of 2.8 maf/yr plus one-half of the excess or surplus water unapportioned by the Compact, to the extent it is available for use in Arizona under the Compact, and also subject to the right of Nevada to contract for 1/25th of any excess or surplus waters. Article 7(1) recognizes the Secretary's authority to contract with users in Arizona and provides that consumptive uses in Arizona are a discharge pro tanto of the obligation of the Arizona contract. A charge of 50 cents per acre-foot is made for diversions directly from Lake Mead during the Boulder Dam cost repayment period and a charge of not more than 25 cents per acre-foot is specified for diversions below Boulder Dam.

Unlike the situation in Arizona and Nevada where the Secretary entered into water delivery contracts with the States, there is no similar contract with the State of California. Rather, there are individual contracts with the five major Colorado River water using agencies in that State. Similarly, except for approximately 100,000 acre-feet of water which Arizona wants reserved for additional municipal and industrial uses along the river, the Secretary has entered into water delivery contracts with individual water using agencies in Arizona and Nevada for quantities which have fully utilized those apportioned to each of those States by the Supreme Court in *Arizona* v. *California*.

B. California Water Delivery Contracts

The background of the water delivery contracts executed by the Secretary following passage of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057, has been described in "The Hoover Dam Documents, Wilbur and Ely, 1948," at pages 101-114.

B.1. Seven-Party Priority Agreement

In California, their execution followed the California Seven-Party Agreement of August 18, 1931, and the Department of Interior's general regulations of September 28, 1931. Each of the current California contracts recites the complete list of the quantities and priorities set forth in the California Seven-Party Agreement of August 18, 1931, rather than a specific quantity of water allocated only to the individual contractor. In brief, these quantities and priorities are as follows:

Priority	Description	Acre-Feet Annually
1	Palo Verde Irrigation District gross area of 104,500 acres	
2	Yuma Project Reservation Division - not exceeding a gross area of 25,000 acres	Priorities 1, 2, and 3 shall not exceed
3(a)	Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by AAC	3,850,000
3(b)	Palo Verde Irrigation District - on 16,000 acres of mesa lands	
4	Metropolitan Water District, and/or City of Los Angeles, and/or others on the coastal plain	550,000
5(a)	Metropolitan Water District, and/or City of Los Angeles, and/or others on the coastal plain	550,000
5(b)	City and/or county of San Diego	112,000
	(5(a) and 5(b) are equal in priority)	
6(a)	Imperial Irrigation District and other lands in Imperial and Coachella Valleys served from AAC	
6(b)	Palo Verde Irrigation District - on 16,000 acres of mesa lands	300,000
	(6(a) and 6(b) are equal in priority)	
	Total	5,362,000

M. N. Nathanson (1978) Updating Hoover Dam Documents USDI - Bureau of Reclamation, Denver, Colorado

The California contracts are between the United States and:

B.2 The Metropolitan Water District of Southern California

April 24, 1930, No. I1r-645, providing for delivery of 1,050,000 acre-feet per year of water immediately below Boulder Canyon Dam. This contract was executed before the Seven-Party Agreement. Article 10 provides for a charge of 25 cents per acre-foot for water delivered to the District during the Boulder Dam cost repayment period. A similar charge appears in the San Diego contract of February 15, 1933, but does not appear in the California agricultural use contracts.

September 28, 1931, I1r-645, supplemented and amended the above agreement by incorporating Article I of the Seven-Party Agreement which, among other things, increased the quantity of Colorado River water to be delivered to MWD by the United States from 1,050,000 acre-feet per year to 1,100,000 acre-feet per year.

M. N. Matheson (1978) Updating The Hoover Dam Documents USDI - Bureau of Reclamation, Denver Colorado

C.20 Rejection of Permanent Commission

California and Nevada have suggested that it would be useful for the Court to provide for a permanent commission or commissioner to administer the decree. The Special Master did not regard this as necessary. In view of the control of the mainstream vested in the Secretary of the Interior, he will in effect administer the decree.

C.21 Claims to Waters in Tributaries

The Special Master divided the controversies arising over tributary water into two general categories. The first category is the controversy between mainstream States and tributary States regarding rights in tributary supply. California expressed concern that increased use on the tributaries will decrease mainstream supply and proposed to treat present tributary inflow as part of the dependable supply in the mainstream. Arizona declared that adjudication of rights in tributary water would be premature and unwarranted. Nevada did not ask that increased uses on the tributaries be enjoined and sought a decree in favor of tributary users as against mainstream interests.

It was the conclusion of the Special Master that the principles of equitable apportionment controlled rights of mainstream States in water of the tributaries of the Colorado River in the Lower Basin. He concluded that the Compact did not displace those principles since it does not govern the relations, *inter sese*, of the States having Lower Basin interests nor did the Project Act and the California Limitation Act render the principles of equitable apportionment inapplicable. The tributaries which empty into the Colorado River in the Lower Basin, other than the Gila River, make a substantial contribution to the mainstream supply. However, the Special Master concluded there is no need to make an apportionment of tributary waters between mainstream and tributary States since mainstream users are presently enjoying the use of tributary flow and there is no indication that such enjoyment is in immediate danger of being interfered with. Hence, mainstream rights to tributary inflow ought not now be adjudicated and a more equitable apportionment might later be achieved when all practical aspects of the decreee are ascertained.

The second category are the controversies over tributary water in the tributary States, *inter sese*. These concern four tributary systems which flow into the Colorado River in the Lower Basin; i.e., the Little Colorado River System, the Virgin River System, Johnson and Kanab Creeks, and the Gila River System.

Nevada, New Mexico, and Utah sought to confirm present uses and to reserve water for future requirements on the inter-State tributaries of the Colorado River flowing within their borders. Arizona did not seek similar adjudication other than in the Gila River System. The United States claimed rights to the use of water from these tributaries for Indian Reservations and other Federal establishments. Since there was no evidence that a substantial conflict existed over the present use of tributary waters, except for the Gila River, and since there is presently unused tributary water regularly flowing into the mainstream from all of the tributaries except the Gila River, the Special Master concluded that the rights of tributary users, *inter sese*, to make increased use of tributary water in the future ought not to be adjudicated.

Similarly the Special Master felt it premature to determine the extent of United States rights in the tributaries. Since the tributaries are not subject to the legal and physical control of the Secretary there was no need to determine priorities in order that the Secretary of the Interior may know how to discharge his duties.

C.22 Gila River System

C.22.1 New Mexico's Claims

New Mexico sought an apportionment of the quantity of Gila River System waters in that State to satisfy its present and future requirements. These claims were resisted by both Arizona and the United States. Since the Gila River System is overappropriated and the available supply is not sufficient to satisfy the needs of existing projects, the Special Master concluded it was appropriate to adjudicate the controversy among New Mexico, Arizona and the United States over the right to water in the Gila System.

The Special Master concluded that a reduction of present New Mexico uses was not warranted despite the fact that many of them are junior in time to downstream Arizona users. The priorities adjudicated in the Gila decree, *United States* v. *Gila Valley Irrigation District* (Globe Equity No. 59), were confirmed but the interpretation of that decree was left to the United States District Court for the District of Arizona, particularly with regard to the use of underground water in addition to surface diversions. As to the 380.81 acres of land within the Virden Valley in New Mexico, not specified in the Gila decree, the compromise between Arizona and New Mexico permitted continued irrigation with water from underground water sources of the Gila River despite the United States objections that this use may reduce the surface supply in the Gila River and thus the quantity of water available for the Gila River Indian Reservation. Nevertheless, unless a change of condition required modification of the proposed decree, the Special Master felt it would be unreasonable to reserve water for future uses in New Mexico while senior downstream appropriators in Arizona remain unsatisfied.

C.22.2 United States Claims

As to the United States claims to reserved water for Federal establishments on tributaries of the Gila River, the conclusion was that it would be inexpedient to adjudicate this type of purely local claim. However, different considerations governed the claims of the United States to water from the Gila River and its inter-State tributaries, since these streams are overappropriated and the controversy is real and immediate.

The United States claimed Gila River water for three Indian Reservations; i.e., Gila River, San Carlos, and the Gila Bend Indian Reservations. The rights of the first two Reservations to divert waters from the mainstream of the Gila River are governed by the Gila decree. In addition, the Special Master felt no reasonable purpose would be served by allocating water to the Gila Bend Indian Reservation at the expense of reducing present New Mexico users, particularly since most of it would be lost in transit.

The Special Master felt it unnecessary to pass on the claims of the United States for any of the nine Federal establishments claiming water of the Gila River and its inter-State tributaries, except as to the Gila National Forest. The reason therefor was that the United States had not demonstrated that it presently utilizes or requires water to carry out the purposes of these establishments. Nevertheless, since the Gila National Forest presently diverted water from the Gila and San Francisco Rivers, a finding was warranted that the United States intended to reserve water necessary to fulfill the purpose for which the forest was created.

The Special Master made findings of fact and conclusions of law to augment the foregoing rights.

D. Special Master's Decree Recommended to Supreme Court

This contained the recommended decree of December 5, 1960, of the Special Master. The text of the Decree appears in the Appendix as 802.

CHAPTER IX

SUPREME COURT OPINION - ARIZONA v. CALIFORNIA OF JUNE 3, 1963, 373 U.S. 546; AND DECREE OF MARCH 9, 1964, 376 U.S. 340

A. Issues

Mr. Justice Black delivered the Opinion of the Court. He stated that:

"The basic controversy in the case is over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." (Opinion, page 551.)

According to the Court this question turned on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in 1928, 45 Stat. 1057 (1928) which controlled the solution of the issue. The Court concluded that Congress, acting under the powers granted by the Commerce Clause and the Property Clause of the Constitution, in enacting the Boulder Canyon Project Act, provided a method of apportionment of waters among the States of the Lower Basin; that the method chosen in the Act "was a complete statutory apportionment intended to put an end to the long standing dispute over Colorado River waters." (Opinion page 560.)

The Court observed that Section 4(a) of the Act was designed to protect the Upper Basin against California should Arizona refuse to ratify the Compact. It provided that, if fewer than seven States ratified within 6 months, the Act should not take effect unless six States including California ratified and unless California, by its legislature, agreed "irrevocably and unconditionally...as an express covenant" to a limit on its annual consumption of Colorado River water of 4.4 maf of the waters apportioned to the Lower Basin States by Article III(a) of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact. Section 4(a) of the Act, said the Court, also showed the continuing desire of Congress to have California, Arizona, and Nevada settle their own differences by authorizing them to make an agreement apportioning to Nevada 300,000 acre-feet, and to Arizona 2.8 maf plus one-half of any surplus waters unapportioned by the Compact. The permitted agreement also would allow Arizona exclusive use of the Gila River wholly free from any Mexican obligation, a position Arizona had taken from the beginning. Sections 5 and 8(b) of the Project Act made provisions for the sale of the stored water.

The Court noted that the Project Act became effective on June 25, 1929, by Presidential proclamation after six States, including California, had ratified the Colorado River Compact and the California legislature accepted the limitation of 4.4 maf as required by the Act. Neither the three States nor any two of them ever entered into any apportionment compact as authorized by Sections 4(a) and 8(b). After the construction of Hoover Dam the Secretary had made contracts with various users in California for 5,362,000 acre-feet, with Nevada for 300,000 acre-feet, and with Arizona for 2,800,000 acre-feet of water from that stored at Lake Mead.

The Court observed that the Special Master found that the Colorado River Compact, the law of prior appropriation, and the doctrine of equitable apportionment do not control the issues in this case. The Court noted that the Master concluded that, since the Lower Basin States had failed to make a compact to allocate the waters among themselves as authorized by Sections 4(a) and 8(b) of the Boulder Canyon Project Act, the Secretary's contracts with the States had, within the statutory scheme of Sections 4(a), 5 and 8(b), effected an apportionment of the waters of the mainstream which, according to the Master, were the only waters to be apportioned under the Act.

The Court further noted that the Master had held that, in the event of a shortage of water which made impossible the supply of water due the three States under their contracts, the burden of the shortage must be borne by each State in proportion to their share of the first 7.5 maf allocated to the Lower Basin (the Court differed with this).

Arizona, Nevada, and the United States supported with few exceptions the Special Master's Report, but California was in basic disagreement with almost all of the Master's Report.

B. Boulder Canyon Project Act Controlled Apportionment

The Supreme Court concluded that:

"...Congress in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress decided that a fair division of the first 7,500,000 acre-feet of mainstream water would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California would each get one-half of any surplus...Division of the water did not, however, depend on the States agreeing to a compact, for Congress gave the Secretary of the Interior adequate authority to accomplish the division. Congress did this by giving the Secretary power to make contracts for the delivery of water and by providing that no person could have water without a contract." (Opinion page 565.)

C. Compact, Prior Appropriation and Equitable Apportionment Inapplicable

The Court rejected California's argument that the doctrine of equitable apportionment was applicable and agreed with the Master that apportionment of the Lower Basin waters of the Colorado River was not controlled by that doctrine or by the Colorado River Compact; that while the doctrine of equitable apportionment was used to decide river controversies between States; e.g., *Wyoming* v. *Colorado*, 259 U.S. 419 (1922); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), in those cases Congress had not made any statutory apportionment. Thus, where Congress provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact the courts have no power to substitute their own notions of an equitable apportionment for an apportionment chosen by Congress.

The Court further agreed with the Special Master that the Colorado River Compact does not control this case. It stated that:

"In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact...Nothing in that Compact purports to divide water among the Lower Basin States nor in any way to affect or control any future apportionment among those States or any distribution of water within a State." (Opinion page 565.)

The Court noted that the Compact is relevant for some purposes. It provided an inter-Basin division; some of its terms are incorporated in the Project Act and are applicable to the Lower Basin, and were placed in the Act to insure that it would not "upset, alter or affect the Compact's Congressionally approved division of water between the Basins." (Opinion page 567.)

D. States Control Use of Tributaries

The Court rejected California's claim that the Project Act, like the Colorado River Compact; i.e., Section 4(a) of the Project Act and Article III(a) of the Compact, dealt with the main river and all of its tributaries. Another California view rejected by the Court was that the first 7.5 maf of Lower Basin water, of which California has agreed to use only 4.4 maf, is made up of both mainstream and tributary water, not just mainstream water. The Court concluded:

"Under the view of Arizona, Nevada, and the United States, with which we agree, the tributaries are not included in the waters to be divided but remain for the exclusive use of each State." (Opinion page 567.)

The court noted that assuming 7.5 maf or more in the mainstream and 2 maf in the tributaries, California would get 1.0 maf more if the tributaries are included and Arizona would get 1.0 maf less. Under the California view, diversions in Nevada and Arizona of tributary waters flowing in those States would be charged against their apportionments and that, because tributary water would be added to the mainstream water in computing the first 7.5 maf available to the States, there would be a greater likelihood of a surplus, of which California would get one-half; i.e., "much more water for California and much less for Arizona."

The Court stated that the Project Act itself dealt only with waters of the mainstream and that the tributaries were reserved to each State's exclusive use. The Court noted that in the negotiations among the States the Lower Basin allocations dealt with "mainstream water, or the water to be delivered by the Upper States at

Lee Ferry, that is to say, an annual average of 7,500,000 acre-feet of mainstream water." (Opinion page 570.)

And finally, in considering California's claim to share in the tributaries of other States, it was important that from the beginning of the discussions and negotiations which led to the Project Act, Arizona had consistently claimed sole use of the Gila River, upon which her existing economy depended.

E. Congress Provided for Apportionment of Water

Thus the Supreme Court concluded:

"The legislative history, the language of the Act, and the scheme established by the Act for the storage and delivery of water convince us also that Congress intended to provide its own method for a complete apportionment of the mainstream water among Arizona, California, and Nevada." (Opinion page 579.)

The Court further stated:

"Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. ...To emphasize that water could be obtained from the Secretary alone, Section 5 further declared, 'No person shall have or be entitled to have the use for any purpose of water stored as aforesaid except by contract made as herein stated.' " (Opinion, pages 579-580.)

"These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his Section 5 contracts, both to carry out the allocation of the water of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made." (Opinion page 580).

"...the Secretary is bound to observe the Act's limitation of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet or mainstream water. This necessarily leaves the remaining 3,100,000 acre-feet for the use of Arizona and Nevada. ...Nevada...took the position...that her conceivable needs would not exceed 300,000 acre-feet which...left 2,800,000 acre-feet for Arizona's use. Moreover, Congress indicated that it thought this a proper division of the waters when in the second paragraph of Section 4(a) it gave advance consent to a tri-State compact adopting such division. *While no such compact was ever entered into, the Secretary by his contracts has apportioned the water in the approved amounts and thereby followed the guidelines set down by Congress."* (underscoring added) (Opinion, pages 583-584.)

E.1 Prior Appropriation Inapplicable

The Court rejected California's contention that the traditional Western water law of prior appropriation should determine the rights of the parties to the water. It noted that in an earlier version of the Boulder Canyon Project Act the bill did limit the Secretary's contract power by making the contracts "subject to rights of prior appropriators" but that restriction did not survive and that "...had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing 'present perfected rights' in Section 5." (Opinion, page 581.)

E.2 State Water Law Inapplicable

The Court rejected the arguments that Congress in Sections 14 and 18 of the Project Act took away practically all the Secretary's power by permitting the States to determine with whom and on what terms the Secretary would make water contracts. It was the Court's view that nothing in those provisions affected the Court's decision that it is the Act and the Secretary's contracts, not the laws of prior appropriation, that control the apportionment of water among the States. The Court held, contrary to the Master's conclusion, that "the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these Sections to follow State law."

Gunnison Basin POWER
People Opposing Water Export Raids

February 12, 1999

The Board of Directors
Upper Gunnison River Water Conservancy District
275 S. Spruce
Gunnison, CO 81230

The Board of County Commissioners
The County of Gunnison
200 East Virginia
Gunnison, CO 81230

The Board of County Commissioners
The County of Hinsdale
Courthouse
Lake City, CO 81235

The Board of County Commissioners
The County of Saguache
Courthouse
Saguache, CO 81149

Ladies & Gentlemen:

In response to Wayne S. Cook's letter to Ms. Klein of January 8, 1999, permit POWER to comment as follows: The business of measuring, allocating and distributing water efficiently from streams is complicated, and in connection with a river system as vast as the Colorado, it boarders on the impossible. Similarly, the wording of the Compact is complicated and ambagious and may need to be clarified (See appendix "A"). Mr. Cook and other Colorado water managers should be hesitant to criticize those who question their interpretation and judgment because if they prove to be wrong, which POWER believes they are as to certain aspects of the Colorado River's administration, great unnecessary expense, inconvenience and trouble could follow. Referring to each other as being guilty of misrepresenting the compact, disregarding facts and making seriously flawed choices is not helpful in arriving at the correct interpretation of the Compact and correctly, properly and fairly representing water users in Colorado and the Upper Basin States.

We have numbered each paragraph and sub-paragraph of Mr. Cook's letter attached hereto as Appendix "B", from 1 through 13, and will comment on each in order.

As to paragraph 1 through 4: we have no further comment.

As to paragraph 5: the first sentence is accurate. Whether the tributaries below Lee Ferry will produce 2 million acre feet of water per annum available after prior claims to satisfy Lower Basin and Mexican requirements in the future is doubtful. The diminishing effects of drought, the calls of the Indian tribes and the prior calls upon such waters by early users protected by the first sentence of Article III of the Compact makes such an optimistic guess unreliable and unrealistic.

As to paragraph 6: this wording is Article III (c) of the Compact, and it is ambiguous - if "over

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February 8, 1999

and above" is over and above the 7.5 million acre feet to be supplied above Lee Ferry by Article III(a), it means one thing; but it means another if such water is to be supplied in whole or in part from waters produced below Lee Ferry. See Mr. Cook's paragraph 8.

As to paragraph 7; no comment.

As to paragraph 8; Regarding sub paragraph (1), POWER is correct that the waters described in Article III (c) & (d) are to be measured at Lee Ferry, by the words, and import of the Compact itself. As to where the waters of Article III (a) & (b) are to be measured, no other measuring place than Lee Ferry is provided in the Compact, or would such be feasible. Taken as a whole, the wording of the Compact directs these waters are to be measured at the only measuring place provided--Lee Ferry.

Would the Lower Basin (or a federal referee) be persuaded that the 7.5 million acre feet referred to in Article III(a) could come in part, or from time to time, from Lower Basin water? We think not. But if Mr. Cook is correct that the 1 million acre feet of Article III(b) can or should be diverted below Lee Ferry, then by the specific words of the Compact, so also a part of the water of Article III (a) could be so diverted as well. The Lower Basin States would not possibly abide by this interpretation. (See our later paragraph herein regarding relative political strengths of the Upper and Lower Basin States.)

Regarding sub-paragraph 8 of Mr. Cook's letter; (2) we do not think these lower basin waters can be so counted to provide (a), (b) & (d) waters. Obviously they can be as to sub-paragraph (c) of Article III of the compact.

Regarding sub-paragraph 8 (3), this is critical. A front range farmer should not have to bet his farm on whether the 1 million acre feet of Article III (b) water would and could be considered as being supplied by Lower Basin tributaries' water and might or might not be available to him.

The language referred to, ie. Article III (a)(b) is not clear but is ambiguous. Those who guess wrong as to its true meaning, as finally determined by a federal referee, are putting innocent water users at grave risk. We believe that Mr. Cook and his colleague Mr. Randy Seaholm of the Colorado Water Conservation Board are guessing wrong as to its meaning.

As to paragraphs 9 and 10: the position of the Upper Colorado River Commission, as set forth in its quoted resolution of July 13, 1984, is untenable. It makes no provision for the Lower Basin's entitlement to 7.5 million acre feet under Articles III (a) and (b) at Lee Ferry, on an annual basis, as such position appears to be a unilateral statement of rights, nor does it consider Indian rights,

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rights of prior appropriators nor (3) does it consider the effect of drought. Although perhaps interesting and comforting, this position would have no binding effect on the Lower Basin States or on a federal referee or judge.

As to paragraph 11: the statement may be correct. However, what the Upper Basin states believe may not be what the Lower Basin states believe or what a federal referee would rule. What if what the Upper Division States believe is erroneous and 8,230,000 acre feet of water can not be delivered because of drought, transmountain diversion or Indian Tribes draw down? What Upper Basin water user will be shut off to make up the deficiencies when such occurs?

As to paragraph 12; POWER contests the statement made here in the first sentence. POWER wonders what will happen when a sustained drought occurs (see our appendix C hereto) or when the Indian tribes demand delivery of their reserved water. What has occurred in the past has a minor, if any, import on what will happen in the future.

As to paragraph 13: POWER has not implied the Lower Basin states have suffered shortages. It warns, however, that if further transmountain diversions from the Colorado River occur in Colorado, shortages are likely to occur in water quantities awarded to Lower Basin States. Even if the 10,400,000 acre feet of water referred to have been available to the Lower Basin states and Mexico, such may not be available if a serious, sustained drought occurs and/or when the Indian tribes make their claim.

Mr. Cook ignores or over-looks four of the most important considerations one should keep in mind in interpreting the Compact for the welfare of future water users in Colorado. These omissions are (1) the effects of the diminishment of water available in the Colorado River System after the Indian tribes have been allotted their reserved shares and such has been diverted, (2) the effect of a serious and sustained drought, (3) the effects of further transmountain diversion to the Front Range of Colorado, and (4) the withdrawals of water unimpaired by the Compact, by prior appropriators, under Article VIII.

Mr. Cook has not fully answered or satisfied POWER'S, and we trust others', concerns about the Colorado River Compact. In POWER'S letter, we warn that many Indian tribes have claims to the water of the Colorado River system which have not yet been made but which have been provided for. (See Article VII of the Compact.) These claims could amount to several million acre feet per annum, and they would come ahead of all junior claims to Colorado River water, ie. later in time to the dates of the Indian reservations. One can rely on the fact that such claims will be enforced when they are made. To ignore or disregard the Indians' claims in allocating Colorado River water would be perilous to all concerned Upper Basin water users.

Gunnison Basin POWER
People Opposing Water Export Raids

February 8, 1999

A severe sustained drought (see appendix C hereto) could knock the "Criteria for Coordinated Long Range Operation of Colorado River Reservoirs " (Mr. Cook's paragraph 11) into a cocked hat. What a drought would not change, however, is in case of a deficiency, the obligation of the Upper Basin states to furnish the water at Lee Ferry referred to in Article III(a)(b)(c) and (d) would continue undiminished. If, pursuant to the Upper Basin states water managers' recommendations and encouragement, more water is permitted to be withdrawn than has now been decreed and divested for the purpose of increasing development out of the basin on the Front Range of Colorado, disaster looms on the horizon.

POWER would make a further point not dealt with by Mr. Cook. Lower Basin need for water is increasing exponentially. Las Vegas, Nevada, has been awarded 42+ sections of dry land by the U.S. Government, (30,080 acres), much of which will need water. (See Appendix D hereto.) Southern California's and the Imperial Valley's need for water is growing by leaps and bounds. No Upper Basin water manager should want to involve Colorado in a dispute over water with the Lower Basin States which boast of 3 U.S. Supreme Court Justices, and whose U.S. Representatives out number our Congressional delegation about 10 to1. To set up a conflict with such weighty opponents does not seem wise to POWER, but rather seems to be a recipe for calamity for our Colorado community.

We ask that you read POWER'S amended letter again with an open mind. We ask our water managers to reconsider the risks and possible dire consequences of dismissing interpretations of the Colorado River compact which Lower Basin users are virtually certain to make in the future as their demands for Colorado River water grow ever more intense.

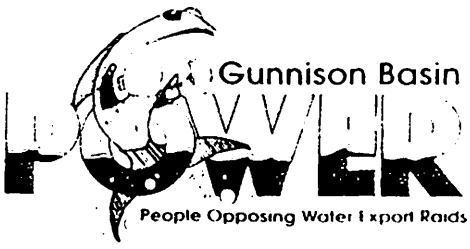
Sincerely,

POWER

F. C. Klingsmith

By: P.C. Klingsmith, Chairman
POWER Steering Committee

P.O. Box 1742
Gunnison, CO 81230



xc: Kathleen Klein
L. Richard Bratton, Esq.
Charles Cliggett, Esq.
David Baumgarten, Esq.
Robert S. Crites, Jr.
Mr. Wayne E. Cook
Mr. Randy Seaholm
Representative Russell George
Senator Ray Powers

P.O. Box 1742
Gunnison, CO 81230

Colorado River Compact

37-61-101. Colorado River compact. The General Assembly hereby approves the compact, designated as the "Colorado River Compact", signed at the City of Santa Fe, State of New Mexico, on the 24th day of November, A.D. 1922, by Delph E. Carpenter, as the Commissioner for the State of Colorado, under authority of and in conformity with the provisions of an act of the General Assembly of the State of Colorado, approved April 2, 1921, entitled "An Act providing for the appointment of a Commissioner on behalf of the State of Colorado to negotiate a compact and agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming and between said States and the United States respecting the use and distribution of the waters of the Colorado River and the rights of said States and the United States thereto, and making

an appropriation therefor.", the same being Chapter 246 of the Session Laws of Colorado, 1921, and signed by the Commissioners for the States of Arizona, California, Nevada, New Mexico, Utah, and Wyoming, under legislative authority, and signed by the Commissioners for said seven States and approved by the Representative of the United States of America under authority and in conformity with the provisions of an Act of the Congress of the United States, approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.", which said compact is as follows:

Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact, under the Act of the Congress of the United States of America approved August 19, 1921, (42 Statutes at Large, page 171), and the Acts of the legislatures of the said states, have through their Governors appointed as their commissioners:

W. S. Norviel, for the State of Arizona;
W. F. McClure, for the State of California;
Delph E. Carpenter, for the State of Colorado;
J. G. Scrugham, for the State of Nevada;
Stephen B. Davis, Jr., for the State of New Mexico;
R. E. Caldwell, for the State of Utah;
Frank C. Emerson, for the State of Wyoming;

who, after negotiations participated in by Herbert Hoover appointed by the President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Article II

As used in this Compact: -

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governor of the signatory states and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the Legislative ratification of the signatory States and the Congress of the United States of America.

Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purpose of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.

Article V

The Chief Official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall co-operate, ex officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

Article VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

Article VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of waters in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Article X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

Article XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

EXHIBIT "A"
pg 2

In Witness Whereof, The Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this Twenty-fourth day of November, A.D. One Thousand Nine Hundred and Twenty-Two.

W. S. Norviel,
W. F. McClure,
Delph E. Carpenter,
J. G. Scrugham,
Stephen B. Davis, Jr.,
R. E. Caldwell,
Frank E. Emerson.

Approved:
Herbert Hoover.

Source: L. 23: p. 684, § 1. not in CSA. CRS 53: § 148-2-1. C.R.S. 1963: § 149-2-1.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310, 373, 374.

C.J.S. See 81A C.J.S., States, § § 8, 31; 93 C.J.S., Waters, § § 5-8.

Law reviews. For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For comment, "Bryant v. Yellen: Perfected Rights Acquire New Status Under a Belated Clarification of Arizona v. California", see 58 Den. L.J. 847 (1981). For article, "The Law of Equitable Apportionment Revisited, Updated and Restated", see 56 U. Colo. L. Rev. 381 (1985). For article, "Competing Demands for the Colorado River", see 56 U. Colo. L. Rev. 413 (1985). For article, "Management and Marketing of Indian Water: From Conflict to Pragmatism", see 58 U. Colo. L. Rev. 515 (1988).

37-61-102. Compact effective on approval. That said compact shall not be binding and obligatory on any of the parties thereto unless and until the same has been approved by the legislature of each of the said states and by the congress of the United States, and the governor of the state of Colorado shall give notice of the approval of said compact by the general assembly of the state of Colorado to the governors of each of the remaining signatory states and to the president of the United States, in conformity with article XI of said compact.

Source: L. 23: p. 693, § 2. not in CSA. CRS 53: § 148-2-2. C.R.S. 1963: § 149-2-2.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310.

C.J.S. See 81A C.J.S., States, § § 8, 31.

37-61-103. Approval waived. That the provisions of the first paragraph of article XI of the Colorado River Compact, making said compact effective when it has been approved by the legislature of each of the signatory states, are hereby waived and said compact shall become binding and obligatory upon the state of Colorado and upon the other signatory states, which have ratified or may hereafter ratify it, whenever at least six of the signatory states have consented thereto and the congress of the United States has given its consent and approval, but this article shall be of no force or effect until a similar act or resolution has been passed or adopted by the legislatures of the states of California, Nevada, New Mexico, Utah, and Wyoming.

Source: L. 25: p. 525, § 1; not in CSA; CRS 53, § 148-2-3; C.R.S. 1963, § 149-2-3.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § 309, 310.

C.J.S. See 81A C.J.S., States, § § 8, 31; 93 C.J.S., Waters, § 7.

37-61-104. Certified copies of compact. That certified copies of this article be forwarded by the governor of the state of Colorado to the president of the United States, the secretary of state of the United States, and the governors of the states of Arizona, California, Nevada, New Mexico, Utah, and Wyoming.

Source: L. 25: p. 526, § 2. not in CSA. CRS 53: § 148-2-4. C.R.S. 1963: § 149-2-4.

UPPER COLORADO RIVER COMMISSION

355 South 400 East • Salt Lake City • Utah 84111 • 801-531-1150 • FAX 801-531-9705

received
FI-99

January 8, 1999

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To Pete Klingsmith	From Jill Steele
Co.	Co. UGRWCD
Dept.	Phone # 641 6065
Fax # 641 1331	Fax # 641 6727

Ms. Kathleen C. Klein
Manager
Upper Gunnison River Water
Conservancy District
275 South Spruce Street
Gunnison, Colorado 81230

Dear Ms. Klein:

I am writing in response to your letter dated December 3, 1998. You have asked for the Commission's opinion concerning a letter you received from People Opposing Water Export Raids (POWER) regarding water availability in the State of Colorado as affected by requirements of the Colorado River Compact. The POWER letter contains serious misinterpretations of the Colorado River Compact and disregards facts regarding water use in the Colorado River Basin. 1

POWER's letter fails to recognize the following critical Compact provisions:

> The term "Colorado River system" means that portion of the Colorado River and its tributaries within the United States of America (Article II(a), emphasis added). 2

> There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of rights which may now exist (Article III(a), emphasis added). 3

> In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters [i.e. waters of "the Colorado River system"] by 1,000,000 acre-feet per annum (Article III(b), emphasis added). 4

The Colorado River system includes the tributaries below Lee Ferry such as the Virgin, Little Colorado and Gila Rivers. These tributaries produce an average of at least two million acre-feet of water per year. 5

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any 6

> waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d) (Article III(c), emphasis added).

6

> The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the 1st day of October next succeeding the ratification of this compact (Article III(d)).

7

In contrast, POWER's letter argues that (1) "The measurement of the water to be apportioned and divided by the Compact . . . is at Lee Ferry, Arizona . . . " (2) "these waters [from Lower Basin tributaries] may not be counted to make up the amount apportioned to the Lower Basin States under Article III(a) (b) (c) or (d)" and (3) the Lower Basin States may make a "call" on the Upper Basin to provide an additional 1,000,000 acre-feet of water per annum. These arguments, however, are clearly refuted by the plain language of the Compact provisions quoted above.

8 (1)(2)(3)

POWER has also misinterpreted the Upper Basin States' Mexican Treaty obligations. The position of the Upper Colorado River Commission on many of POWER's assertions is stated in the following paragraph of a resolution passed by the Commission at its Adjourned Regular Meeting on July 13, 1994:

9

> [I]t is the position of the Upper Colorado River Commission and the Upper Division States that, with the delivery at Lee Ferry of 75 million acre-feet of water in each period of ten consecutive years, the water supply available in the Colorado River System below Lee Ferry may be sufficient to meet the apportionments to the Lower Basin provided for in Article III(a) and (b) of the Colorado River Compact and the entire Mexican Treaty delivery obligation;

10

The "Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs," authorized by the 1968 Colorado River Basin Project Act, govern operation of Lake Powell and Lake Mead, together with other Federal reservoirs. Pursuant to these Criteria, the objective of the Bureau of Reclamation is to maintain a minimum release of 8,230,000 acre-feet of water from Lake Powell each year, which the Upper Division States believe is more than sufficient to satisfy all downstream demands, including Mexican Treaty obligations.

11

POWER also misunderstands some fundamental facts regarding historic and present use of the waters of the Colorado River Basin. POWER states that Mexico "has not yet called

12

upon" its treaty entitlement. In reality, at least 1,500,000 acre-feet of water have been delivered to the Republic of Mexico every year since the Treaty was signed. Those deliveries are documented in reports by the International Boundary and Water Commission and since 1969 by the Bureau of Reclamation in its reports entitled "Compilation of Records in Accordance With Article V of the Decree of the Supreme Court of the United States in Arizona v. California Dated March 9, 1964." 12

POWER also implies that the Lower Basin States have suffered shortages. In fact, the Upper Basin States have never delivered less than 75,000,000 acre-feet of water in any period of 10 consecutive years. Furthermore, the Bureau of Reclamation prepares a "Consumptive Uses and Losses Report" that documents all water used in the Colorado River Basin. The "Consumptive Uses and Losses Report" shows that much more than 1,000,000 acre-feet of water has been used from Lower Basin tributaries for many years. According to the Bureau of Reclamation, total consumptive uses in the Lower Basin for the period 1986-1990 averaged more than 10,400,000 acre-feet. 13

To summarize, the group's interpretation of the Colorado River Compact is seriously flawed, and the letter ignores documented facts about Colorado River system water use in the Lower Basin States. If you have any questions regarding this letter, please call me. 14

Very truly yours,

Wayne E. Cook

Wayne E. Cook
Executive Director

No comment to the Indians

The Denver Post 12/16/98

SPECIAL REPORT

Scientists fear onset of Dust Bowl

By Seth Borenstein
Knight Ridder News Service

WASHINGTON — The nation's Midwestern breadbasket is overdue for another 1930s-style Dust Bowl, and while it's too early to tell for sure, the parched summer of 1998 may have marked the start of one, government weather researchers said Tuesday.

And we could be getting off easy with a Dust Bowl.

A much larger drought could be on the way within the next century or so, researchers say. Using tree rings, submerged tree trunks, archaeological finds, lake sediments and sand dunes, they found that twice in the last 700 years "megadroughts" have struck the area. They have lasted two to four decades, instead of years.

The megadroughts were just one element of a complex cycle of droughts discovered by researchers from the National Oceanic and Atmospheric

Please see DROUGHT on 18A

Scientists fear onset of Dust Bowl

DROUGHT from Page 2A

Administration. They also found that major Dust Bowl droughts generally hit twice a century and that smaller two-year droughts strike every 20 years or so.

"There's this 20-year periodicity of drought, we're not sure what that is due to, but it seems to be fairly regular," said Connie Woodhouse, a University of Colorado research scientist working at NOAA's National Geophysical Data Center. "So if that's true, we should be expecting another drought, maybe a big drought in the next two years."

This summer's dramatic dry spell along the southern plains and mid-Atlantic states — severe in parts of Texas and Florida — could be the limited beginning of such a drought, she said. But Woodhouse and her colleague, Jonathan Overpeck, head of paleoclimatology for NOAA, said it was still too early to tell.

Other researchers are even more cautious.

Vern Kousky, a NOAA climatologist who monitors El Niño and La Niña warmings and coolings of the central Pacific and is not part of the drought research team, said, "I don't see us in the midst of a great drought right now." But, he said dry conditions in the southern plains will continue through the crucial winter months and the spring and summer growing seasons because of the La Niña weather phenomenon, in which cooler than normal water temperatures in the central Pacific disrupt normal precipitation patterns.

Droughts are expensive. The $39 billion expense of the one- to two-year drought in 1988-89 was a bigger blow to the U.S. economy than the devastation of Hurricane Andrew, said NOAA official Roger Pulwarty, who joined Woodhouse and Overpeck at a Tuesday news conference in Washington. The current drought already has caused about $7 billion in damage, NOAA estimates.

"The droughts that we've had in this century are relatively minor in perspective of the last 2,000 years," Overpeck said. He said the 16th-century megadrought, which was heavy in the Great Plains and the West Coast, lasted 20 to 30 years, he said.

Next 'Dust Bowl' unpredictable, may have started

Climate scientists disagree on threat

By J. Sebastian Sinisi
Denver Post Staff Writer

Along with low prices, high costs and diminished market share for red meat, Colorado cattlemen may have to deal with a drought that some climate scientists say is overdue.

Some experts have reported that the extremely dry summer of 1998 may have marked the start of another drought. Others, however, predict a serious and protracted dry spell may be decades away.

This century has seen three droughts come roughly in 20-year cycles — in the 1930s, 1950s and 1970s. If the pattern holds, the West is due, even overdue, climatologists say. But they also admit the phenomenon isn't as predictable is it looks.

In the short-term, continued dry conditions are likely for western Kansas, west Texas, New Mexico and southeast Colorado, said climate scientist Martin Hoerling of the National Oceanic and Atmospheric Administration in Boulder.

"Drought damage in Texas was $5.8 billion last year," he said. "Rains did come late last summer, but reservoirs in the Rio Grande Valley were down to 19 percent of capacity."

No snow in southeast Colo.

Southeast Colorado has not received a single inch of snow this season, Hoerling said. Normally, the region should already have about 18 inches of snow, he said. Snowpack on the Western Slope also is down sharply.

Moreover, rainfall levels are about one-fourth of normal for the entire Southwest for the meteorological season, which runs from July 1 to June 30.

"Not only is the entire Southwest very dry," said Hoerling, "but we have no reason to believe that it won't continue through the next several months and into next summer. The evidence of ocean currents doesn't point to much rain this spring, and it was the lack of rains last spring that caused widespread crop damage."

Those colder-than-normal ocean currents, he said, create a "La Niña" — almost the opposite of the moisture-rich "El Niño" — effect on wind patterns. The bottom line: less rain over the Great Plains.

'Dust Bowls' common

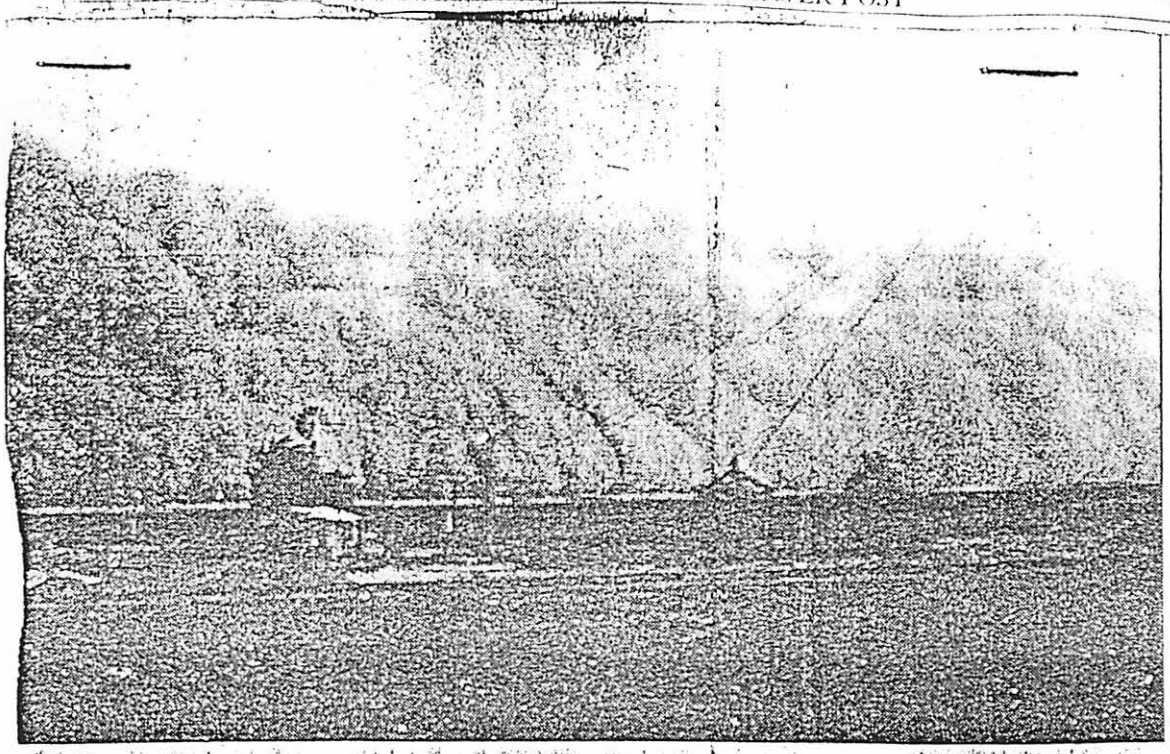
Connie Woodhouse, a University of Colorado researcher working at NOAA in dendroclimatology, the study of tree rings to trace climate cycles, takes a longer-term view.

"The data we have from tree rings and lake sediments shows that, during the past 400 years in this part of the world, each century has had two droughts of 'Dust Bowl' magnitude," she said. "There were serious droughts in the 1860s, 1820s, 1750s and 1660s.

"Drought in the 1930s lasted seven years and was over by 1938. That in the '50s ran five years, until 1956. Although people feared another Dust Bowl in the late '70s, that drought wasn't as severe. But, based on the historical record, we can expect a 1930s-magnitude drought sometime in the coming century," she said.

Other researchers speculate the next century could also see a "megadrought" of two to four decades rather than several years. Tree rings, lake sediments, sand dunes and archaeological evidence indicate that two of these hit this region, in-

Please see DROUGHT on 3E



Denver Post file photo

A giant dust storm approaches Dodge City, Kan., during the 1930s drought.

Scientists differ on next drought

DROUGHT from Page 1E

cluding the Midwest "bread basket," during the last 700 years.

The first of those megadroughts, in the 1200s, is widely believed to have wiped out the Anasazi culture around Mesa Verde and elsewhere in the Four Corners region.

Both Woodhouse and Hoerling said recent years have seen revived scientific interest in a formerly discredited "sunspot theory" that linked sunspot activity, and changes in solar radiation, to weather and agricultural cycles. Those, in turn, were tied to economic cycles of boom and bust when agriculture played a bigger role in world economies.

Vivid memories

For some people, Dust Bowl memories remain vivid more than 60 years later.

Seventy-year-old Kansas rancher Bill Young, in Denver for the National Western Stock Show and Rodeo, remembers Dust Bowl times in Kansas in 1936.

"It was terrible," he said. "I remember people lined up to get emergency food from the federal government.

"My family lived in a house with a dirt floor and no electricity. We had no gas for the car. People weren't eating and out-of-work men were riding the rails in box cars. But there was no work anywhere in a part of the country that could feed half the world.

"Not many people today can even imagine what it was like in 1936," said Young, whose Broken Lance cattle operation today spans 500 acres in south Kansas and Missouri. "But you couldn't blame farmers and ranchers then. They were uneducated and had no idea what was going to happen. Today, we know better. We know how to hold the soil down with contour plowing and shelter belts.

"But if we have just two consecutive years of drought, a lot of ranchers won't make it. Old-timers, who got their land years ago, can survive. But those who came in later and have big bank notes to pay off have no chance. Today, the banks can't even carry them if they wanted to; new regulations have eliminated that."

In Colorado in the 1930s, "ranchers went broke and some committed suicide," recalled Greeley rancher W.D. Farr, 88, who was presented the National Western's 1999 "Citizen of the West" award last week.

"During dust storms, cars had their headlights on in the middle of the day. Kansas and Oklahoma were worse, but it was pretty terrible in Colorado with no water. That's why we needed the Big Thompson project," added Farr, who was a prime mover behind the tunnel project that in the late 1930s began diverting water from the Western Slope to the Front Range.

Question of survival

During those Dust Bowl years, "it wasn't a question of making any money, but of simply surviving," said Stock Show President Pat Grant, whose father ran a ranch near Roggen in northeast Colorado.

Weld County rancher and Stock Show official Ben Houston was just a boy back then, but "I often wonder how we survived it at all."

"They'd have to trail cattle 50 miles to find some grass, and I remember dust caked on cattle so that they could barely breathe."

27,000 acres of public land near Las Vegas up for sale

By The New York Times

CARSON CITY, Nev. — The federal government is preparing to auction 27,000 acres of public land near Las Vegas estimated to be worth $500 million to $1 billion, with almost all of the proceeds to stay in Nevada instead of going to the Treasury.

Like many cities in the West, Las Vegas is surrounded by public land managed by the Interior Department.

The Bureau of Land Management has designated 55,000 acres of desert within a 460-square-mile zone around the city for eventual disposal to developers and local governments.

The government has been reluctant to sell public land in the past, because the proceeds went to the Treasury and neither the Interior Department nor Nevada gained anything.

Previously, the government traded developable public land near Las Vegas to developers in exchange for environmentally sensitive private lands elsewhere in Nevada.

But these exchanges have become mired in controversy, with federal audits finding that the government received far less than equal value in many exchanges.

Rep. John Ensign, a Republican, has said the government lost nearly $40 million in the last two years in land trades with developers.

Now, under a bill enacted by Congress and signed by President Clinton, the government will sell the public land at auction. Eighty-five percent of the proceeds will go to acquire environmentally sensitive private land in Nevada and to improve parks and recreation areas around Las Vegas; 10 percent to the Southern Nevada Water Authority to build drinking-water pipelines; and 5 percent to schools in Nevada.

The Las Vegas office of the Bureau of Land Management is already fielding calls from potential bidders, said a public affairs officer, Phillip Guerrero.

Under the legislation, the airport authority in Las Vegas is picking up about 5,000 acres in its noise-abatement area at no cost.

Local governments can also acquire parks and rights-of-way for water, sewage and flood-control projects at no cost. And more than 20,000 acres are expected to be sold to local governments for only $10 an acre for other purposes.

That leaves as much as 27,000 acres of public land that is expected to be auctioned to developers for $18,000 to $37,000 per acre. The land will be sold in parcels of five to 2,500 acres.

Each parcel will be offered with minimum bids set by a government-approved appraisal.

DICK KRECK

Professor makes like Cassandra

It's the numbers, stupid. There are too many of us, and it's only getting worse.

Don't take my word for it; I can barely balance my checkbook. Ask **Albert Bartlett**, professor emeritus of physics at the University of Colorado in Boulder.

He keeps talking, but it's worse than rolling that mythical stone uphill. Bartlett, 79, delivers his favorite lecture, "Arithmetic, Population and Energy," for the 1,471st time Saturday as part of the university's Saturday Physics Series. He estimates that he's sounded this apocalyptic warning every nine days since 1969.

The number is not a guess. He's a physics professor, not a fortune teller. He's counted.

The problems are people and natural resources. There are too many of the former and too little of the latter.

"The basic thing is, people don't understand the arithmetic of growth," says Bartlett, whose gloomy predictions belie his upbeat personality. "If you have 5 percent growth for 50 years, that sounds innocuous. But it's a factor four of 8 to 10 percent increases. People have no idea of the big numbers. When you have a finite resource and an increasing rate of consumption, the stuff disappears at an incredibly early date.

"Understand that essentially all of the urban problems come from urban growth. Think of any problem on any scale whose long-term solution is in any demonstrative way aided, assisted or advanced by larger populations."

Case in point: Water in Colorado. "Anybody who's been here knows droughts are part of the history of the West. Anyone who would aspire to be a planner ought to know about these things, but they don't."

The more-reservoirs solution makes him laugh. "It is totally irrational that the only way to have a permanent solution is more reservoirs. That's nuttier than a fruitcake. It's people causing the trouble. In any realistic assessment, you can't achieve enough (saving) through conservation to balance a 2-3 percent growth rate."

A favorite example of how population has thrown things out of kilter is the Boulder City Council. "When I moved here in 1950, the population was 20,000. Today, it's 100,000. There were nine members of the City Council then, and there are nine now. That means democracy has declined 20 percent compared to what it was 50 years ago. There are five times as many people per council member."

Bartlett, who's been on the CU physics faculty for 53 years, admits he gets tired of banging his head on the wall of public apathy. "But I enjoy doing this. When people understand, their reaction is always very favorable to the talk. There are few people who reject this. I give them a copy of a paper I wrote and ask them to get back to me with errors they find. They never do."

The population explosion cannot continue unabated without consequences, he predicts. Nature steps in. See: Africa and drought and AIDS and civil war.

Bartlett's 2 p.m. speech in Duane Physics G1B20 on the CU campus is part of a once-a-month free lecture series that continues through April 12.

- CONFIDENTIAL -
NOT FOR PUBLIC RELEASE

TABLE 6(c)
COLORADO RIVER COMPACT CONSUMPTIVE USE APPORTIONMENT
COLORADO APPORTIONMENT: 3,079,125 A.F.
DISTRIBUTED BASED ON PRORATA SHARE OF BASIN YIELD

DRAFT 11/1/91

STATION	1/ CRSS NATURAL FLOW (AF)	2/ % OF TOTAL NATURAL FLOW	3/ COLORADO APPORTIONMENT 3,079,125	4/ EXCESS WATER	5/ CURRENT AVERAGE CONSUMPTIVE USE (1981-85)	6/ MAXIMUM CONSUMPTIVE USE 1981-85 (YEAR)	7/ AVAILABLE FOR FUTURE CONSUMPTIVE USE
GREEN RIVER BASIN							
LITTLE SNAKE RIVER @ LILY, CO 8/	220,400 8/	2.04	62,810	157,590			
YAMPA RIVER @ MAYBELL, CO	1,241,100	11.49	353,790	887,310			
WHITE RIVER NR WATSON, UTAH	573,400	5.31	163,500	409,900			
TOTAL	2,034,900	18.84	580,100	1,454,800	167,100	183,700 (1981)	396,400 - 64,260 9/ 332,140
COLORADO RIVER BASIN							
COLORADO RIVER NR CAMEO, CO	3,602,400	33.36	1,027,190	2,575,210			
GUNNISON RIVER NR. GRAND JCT., CO	2,378,700	22.03	678,330	1,700,370			
DOLORES R. NR. CISCO, UTAH 8/	843,500 8/	7.81	240,480	603,020			
TOTAL	6,824,600	63.20	1,946,000	4,878,600	1,735,000	1,866,800 (1982)	79,200 -215,580 9/ -136,380
SAN JUAN RIVER BASIN							
SAN JUAN R. NR. BLUFF, UTAH 8/	1,938,200 8/	17.95	552,700	1,385,500			
TOTAL	1,938,200	17.95	552,700	1,385,500	91,900	108,600 (1984)	444,100 - 61,230 9/ 382,870
STATE OF COLORADO							
TOTAL	10,797,700	100	3,079,125	7,718,575	1,994,000	2,159,100	920,025
CRSP Evaporation			-----	-----	306,400 (AVE)	341,100 (max)	341,100
TOTAL			3,079,125	7,718,575	2,300,400	2,500,200	578,925

/ Long term average natural flow at Gaging Station computed by USBR for the period 1906-85.
/ % of the total natural flow originating in Colorado.
/ Colorado's apportionment distributed to subbasins (3,079,120 x % of Total Natural Flow).
/ Water in excess of Colorado apportionment which must flow out of the state.
/ Average consumptive use in Colorado between 1981 and 1985 from USBR.
/ Maximum consumptive use in Colorado between 1981 and 1985 from USBR.
/ Available for additional consumptive use beyond current use (Apportionment - Maximum Consumptive Use).
/ Estimated Natural Flow originating in Colorado. (Part of drainage area lies outside of Colorado.)
/ CRSP mainstem reservoir evaporation apportioned to each subbasin in Colorado.

Released 1995 for Colorado River Compact Water Development Project, Colorado River Compact Water Development Workgroup.

J/DRS/bj/791

BJ259.TAB

Gunnison Basin POWER
People Opposing Water Export Raids

USEFUL SOURCES OF INFORMATION ON CURRENT WATER ISSUES

Basalt Water Conservancy District, Basalt, Colorado --- collection of water related web links to Western Slope municipalities, federal agencies, state agencies, national water organizations, state organizations, water education organizations, congressional offices, and state legislature and law; available at web site www.bwcd.org/links.html

Colorado Water Resources Research Institute, Colorado State University, Fort Collins Colorado --- drought and other water related research publications available at web site www.cwrri.colostate.edu/droughtpubs.html

- - - - - - - -

Driver B and Miller B. (2003) Gunnison Basin Water: No Panacea for the Front Range, The Land And Water Fund of the Rockies, Boulder, Colorado, 74 pages, available on web site at www.lawfund.org.

Kuhn E. (2003) First Regular Quarterly Report of the Colorado River Water Conservation District, Colorado River Water Conservation District, Glenwood Springs, Colorado, 45 pages, available at www.crwcd.org.

Luecke D. F., Morris J., Rozaklis L, and Weaver R., (2003) What the Current Drought Means for the Future of Water Management in Colorado, Colorado Water Project - Trout Unlimited and the Colorado Environmental Coalition, Boulder and Denver, Colorado, 66 pages, available at website www.cotrout.org.

UPPER COLORADO RIVER COMMISSION

received
1-11-99

355 South 400 East • Salt Lake City • Utah 84111 • 801-531-1150 • FAX 801-531-9705

January 8, 1999

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 3

To Pete Klingsmith	From Jill Steele
Co.	Co. UGRWCD
Dept.	Phone # 641 6065
Fax # 641 1331	Fax # 641 6727

Ms. Kathleen C. Klein
Manager
Upper Gunnison River Water
Conservancy District
275 South Spruce Street
Gunnison, Colorado 81230

Dear Ms. Klein:

I am writing in response to your letter dated December 3, 1998. You have asked for the Commission's opinion concerning a letter you received from People Opposing Water Export Raids (POWER) regarding water availability in the State of Colorado as affected by requirements of the Colorado River Compact. The POWER letter contains serious misinterpretations of the Colorado River Compact and disregards facts regarding water use in the Colorado River Basin. 1

POWER's letter fails to recognize the following critical Compact provisions:

> The term "Colorado River system" means that portion of the Colorado River and its tributaries within the United States of America (Article II(a), emphasis added). 2
>
> There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of rights which may now exist (Article III(a), emphasis added). 3
>
> In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters [i.e. waters of "the Colorado River system"] by 1,000,000 acre-feet per annum (Article III(b), emphasis added). 4

The Colorado River system includes the tributaries below Lee Ferry such as the Virgin, Little Colorado and Gila Rivers. These tributaries produce an average of at least two million acre-feet of water per year. 5

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any 6

> waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d) (Article III(c), emphasis added). 6

> The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the 1st day of October next succeeding the ratification of this compact (Article III(d)). 7

In contrast, POWER's letter argues that (1) "The measurement of the water to be apportioned and divided by the Compact . . . is at Lee Ferry, Arizona . . . " (2) "these waters [from Lower Basin tributaries] may not be counted to make up the amount apportioned to the Lower Basin States under Article III(a) (b) (c) or (d)" and (3) the Lower Basin States may make a "call" on the Upper Basin to provide an additional 1,000,000 acre-feet of water per annum. These arguments, however, are clearly refuted by the plain language of the Compact provisions quoted above. 8 (1)(2)(3)

POWER has also misinterpreted the Upper Basin States' Mexican Treaty obligations. The position of the Upper Colorado River Commission on many of POWER's assertions is stated in the following paragraph of a resolution passed by the Commission at its Adjourned Regular Meeting on July 13, 1994: 9

> [I]t is the position of the Upper Colorado River Commission and the Upper Division States that, with the delivery at Lee Ferry of 75 million acre-feet of water in each period of ten consecutive years, the water supply available in the Colorado River System below Lee Ferry may be sufficient to meet the apportionments to the Lower Basin provided for in Article III(a) and (b) of the Colorado River Compact and the entire Mexican Treaty delivery obligation; 10

The "Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs," authorized by the 1968 Colorado River Basin Project Act, govern operation of Lake Powell and Lake Mead, together with other Federal reservoirs. Pursuant to these Criteria, the objective of the Bureau of Reclamation is to maintain a minimum release of 8,230,000 acre-feet of water from Lake Powell each year, which the Upper Division States believe is more than sufficient to satisfy all downstream demands, including Mexican Treaty obligations. 11

POWER also misunderstands some fundamental facts regarding historic and present use of the waters of the Colorado River Basin. POWER states that Mexico "has not yet called 12

upon" its treaty entitlement. In reality, at least 1,500,000 acre-feet of water have been delivered to the Republic of Mexico every year since the Treaty was signed. Those deliveries are documented in reports by the International Boundary and Water Commission and since 1969 by the Bureau of Reclamation in its reports entitled "Compilation of Records in Accordance With Article V of the Decree of the Supreme Court of the United States in Arizona v. California Dated March 9, 1964." 12

POWER also implies that the Lower Basin States have suffered shortages. In fact, the Upper Basin States have never delivered less than 75,000,000 acre-feet of water in any period of 10 consecutive years. Furthermore, the Bureau of Reclamation prepares a "Consumptive Uses and Losses Report" that documents all water used in the Colorado River Basin. The "Consumptive Uses and Losses Report" shows that much more than 1,000,000 acre-feet of water has been used from Lower Basin tributaries for many years. According to the Bureau of Reclamation, total consumptive uses in the Lower Basin for the period 1986-1990 averaged more than 10,400,000 acre-feet. 13

To summarize, the group's interpretation of the Colorado River Compact is seriously flawed, and the letter ignores documented facts about Colorado River system water use in the Lower Basin States. If you have any questions regarding this letter, please call me. 14

Very truly yours,

Wayne E. Cook

Wayne E. Cook
Executive Director

No comment to the Indians

Gunnison Basin POWER
People Opposing Water Export Raids

November 18, 1998

The Board of Directors
Upper Gunnison River Water Conservancy District
275 S. Spruce
Gunnison, CO 81230

The Board of County Commissioners
The County of Gunnison
200 East Virginia
Gunnison, CO 81230

The Board of County Commissioners
The County of Hinsdale
Courthouse
Lake City, CO 81235

The Board of County Commissioners
The County of Saguache
Courthouse
Saguache, CO 81149

Re: *WATER AVAILABILITY FOR TRANSMOUNTAIN DIVERSION - CONSEQUENCES OF FURTHER TRANSMOUNTAIN DIVERSION*

Ladies and Gentlemen:

We have met with the Gunnison River District Board twice to: (1) discuss whether any water remains in the Colorado River System for transmountain diversion after all legal claims against such waters have been met; (2) to persuade it that no unclaimed water is available for transmountain diversion; and (3) to discuss the unfortunate and dire consequences which would occur if more water than that already diverted were to be diverted to the Front Range. In explaining the amount of water available, we have relied upon figures provided us by the State of Colorado Engineer's office as well as the Bureau of Reclamation. Both of these sources basically agree with each other to an acceptable degree. The purpose of this letter is to present our concerns (1) regarding the interactions between the provisions of the Colorado River Compact and transmountain diversion, and (2) to discuss present and future courses of action to alleviate such.

HISTORY OF THE RIVER

The Colorado River Compact was executed in 1922, and was finally approved by all of the states involved. Arizona, the last signatory, signed it in 1944. In 1963, Glen Canyon Dam was constructed across the Colorado River and began to store water in Lake Powell. All of the waters of the Colorado River above Lee Ferry, AZ, have already been or surely will be claimed with earlier entitlement dates than any water hereafter sought to be diverted to the Front Range of Colorado.

COLORADO RIVER COMPACT REQUIREMENTS

P.O. Box 1742
Gunnison, CO 81230

Gunnison Basin POWER
People Opposing Water Export Raids

Replacement to Page 2 of the November 18, 1998 letter

January 4, 1999

The Colorado River Compact imposes certain duties and obligations on the Upper Basin State in favor of the Lower Basin below Lee Ferry. See the attached Exhibit "A": two pages of the Compact with relevant provisions highlighted. Article III (a) apportions to each basin 7,500,000 acre feet of water per annum. By sub-paragraph (b), it allows the Lower Basin to call upon an additional 1,000,000 acre feet per annum for beneficial consumptive use. Under paragraph (c), it provides that Mexico shall have an entitlement to Colorado River System water, determined by treaty to be 1,500,000 acre feet per annum. If there is any shortage in this quantity passing the United States' border, it shall be furnished equally by the Upper and Lower Basins, the Upper Basin's portion measured at Lee Ferry. Finally at paragraph (d) the compact provides that the Upper Basin shall not withhold the water thus causing the flow of water of the Colorado River at Lee Ferry to be depleted below an aggregate of 75, 000,000 acre feet in a 10 year moving average.

The Compact specifies that the amount of water referred to in Article III (c) and (d) shall be measured at Lee Ferry, but does not specify where the other quantities of water referred to in paragraphs (a) and (b) of said article are to be measured. Considering the entire wording of Article III and IV, we believe a court would rule all of the water required be measured at the Lee Ferry. It does not seem reasonable or feasible the waters mentioned in Article III, would have other measurement points.

The Compact does not provide that the Upper Basin States may lay claim to waters flowing into the Colorado River from streams such as the Virgin and Gila Rivers in Arizona or at other sources below Lee Ferry, either physically or by being credited therefore. Consequently, we submit these waters belong to the Lower Basin States (and Mexico and the Indian Tribes) and will not be counted to constitute the amount apportioned to the Lower Basin States under Article III (a) and (b).

The Compact is silent as to what penalties will be imposed for any breach. Experience would indicate, however, from the happenings in connection with the Two Forks Dam project and the Arkansas River dispute with Kansas, that the contest would be resolved by Federal referee, at least in the first instance, strongly biased in favor of strict Compact compliance to the Upper Basin's deteriant.

ACTUAL DIVERSIONS AND SHORTAGES

The information available to POWER consists of records furnished by the Department of Natural Resources – Colorado Water Conservation Board, and the United States Department of Interior – Department of Reclamation. Those figures show that at the present time, and under the present entitlement by the Lower Basin States, the historic flow at Lee Ferry has provided some amount more than 7,500,000 acre feet of water to the Lower Basin States each year since 1965. It further shows that, if and when the Lower Basin States place a call under Article III (b), the Compact requirements at Lees Ferry would be met much less frequently. Specifically, during the 46 years between 1953 and 1998, obligations would have been met 39 years; slightly more than 80% of the time. The amount of the annual flows during the short years varies from year to year. The annual shortage in acre feet of water is not insignificant. In addition to the 7,500,000 and 1,000,000 acre feet of

Compact obligation to the Lower Basin States, the duty to supply water to Mexico, under its treaty entitlement of 1944, amounts to 1,500,000 acre feet per annum with the Upper and Lower Basin States each providing one half thereof. Thus Upper Basin States must provide up to 750,000 acre feet per annum in case Mexico is shorted and decides to place a call, which call would require the Upper Basin States to furnish a total flow at Lee Ferry of up to 9,250,000 acre feet per annum. We at POWER have been advised by representatives of the Colorado Water Conservation Board that Mexico has not yet called upon its yearly entitlement. Apparently Mexico does not want to jeopardize its relations with the United States during the period of the NAFTA negotiations. It is as sure as most anything in this old world, during these changing times, that Mexico will call upon its entitlement sooner than later. If Mexico's entitlement is considered, shown by column D of figures on "Exhibit B" attached hereto, the Upper Basin States could have fulfilled their compact requirements in only 17 of the past 46 years or slightly more than one third of the time.

There is another potential call upon the Colorado River that would seriously affect Colorado and the Upper Basin States. The Compact at Article VII provides that nothing in the Compact shall be construed as affecting the obligation of the United States to the Indian tribes. There are several tribes which could make a claim to the waters of the Colorado River. The Colorado Supreme Court has indicated in connection with its ruling regarding the reserve water rights of the United States, that the Indians' water rights will be quantified and established. Such rights will predate and supercede most of the water rights existing in Colorado. It is certainly not possible at this time to say what the effect of the Indian claims will amount to, but one can almost be sure it will not be de-minimus. The existence of the Indian claims alone makes further transmountain diversion speculative.

COLORADO'S HISTORY OF DISAPPOINTMENTS

Colorado has battled with its downstream neighbors on several occasions concerning its shorting them of water due them under interstate compacts. Specifically, it has been involved in litigation with Wyoming, Nebraska, Kansas, Texas and New Mexico. In each and every dispute, Colorado has lost. The penalty for not complying has varied from case to case. In the current suit with Kansas, which was the latest fiasco, Colorado will probably be required to make up the determined water shortage and pay Kansas for the damages it has incurred. Colorado was warned 90 years ago this would happen. What happens when Colorado is required to terminate water rights to which its citizens have become accustomed to using is indeed traumatic and damaging.

P.O. Box 1742
Gunnison, CO 81230

Gunnison Basin
POWER
People Opposing Water Export Raids

November 18, 1998

WATER REQUIREMENTS IN THE LOWER BASIN STATES

Can any informed person believe that California, particularly the Los Angeles region, will not want to use an additional 1,000,000 acre feet per annum? An automobile trip through that area will disclose that retirement and business communities are popping up like cacti in the desert. We recently noticed an item in a newspaper during October 1998 which indicates that Las Vegas, Nevada will receive title to 27,000 surrounding acres of dry land from the Government. That amounts to over 42 square miles of land, a large portion of which Las Vegas intends to subdivide and sell for residential purposes. Las Vegas is sorely pressed for enough water to satisfy existing residential , business and commercial needs. To ask whether it could use additional water out of the 1,000,000 acre feet apportioned the Lower Basin States in Article III (b), is to ask a question which needs no answer.

POWER'S RECOMMENDATIONS

We recommend that the Upper Gunnison River Water Conservancy District and the Counties of Gunnison, Saguache and Hinsdale jointly seek to terminate future Front Range efforts to divert additional water from the Colorado River System. Perhaps the best plan would be to try to obtain the agreement of large water users such as Denver, Colorado Springs, Northeastern, Central and the South East Water Conservation Districts that they will no longer seek to divert additional waters, and that they will oppose any further Front Range diverter's efforts to do so. It is probably too late in the game to call the Colorado Supreme Court's attention to the fact (in the present suit with Arapahoe County,) that considering the implications of the Compact, there is no undecreed water available for trans-mountain diversion in the Colorado River System, although the advice from the attorneys opposing the Arapahoe case needs to be sought on this point.

Perhaps the most reasonable way of obtaining a halt to further transmountain diversions would be through legislative action. The Constitution of Colorado provides at Article XVI, Sections 5 and 6, that the unappropriated waters of every stream in Colorado are the property of the public and dedicated to the use of the People of Colorado, and that the right to divert unappropriated waters should never be denied. If the argument presented in this paper holds water, there is no unappropriated water in the Colorado River System and the General Assembly would be justified in so declaring. Such justification would be to: (1) prevent huge sums of money being spent to divert water which would not be available for diversion considering the Compact, to (2) prevent the construction of houses and creation of businesses in the belief that water existed whereas in fact it did not, and to (3) avoid economic hardship and social disruption which will follow the seemingly endless efforts on the part of the Eastern Slope water users to take water from the Colorado River System. Most importantly, (4) any action Colorado users take which would

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Gunnison, CO 81230

Gunnison Basin POWER
People Opposing Water Export Raids

November 18, 1998

further decrease water flows to the Lower Basin States and Mexico would likely cause them to end their consent to water shortages and require the Upper States to deliver each year and in total all the water the Compact allots them. We in Colorado should not kick the sleeping dog by increasing Lower Basin water shortages. We think the time has come for the water using entities in Gunnison, Saguache and Hinsdale Counties to band together to present a united front to set in place a permanent injunction or prohibition of any further efforts to divert water from the Colorado River System in Colorado, out of the basin.

Finally, (5) we should on a stepped up basis, continue our efforts to educate people on the Front Range of the need to discourage and terminate further transmountain diversion.

Sincerely yours,

POWER

P.C. Klingsmith, Chairman
Power Steering Committee

Approved and Adopted:

Gerald Lain

Butch Clark

John Cope

Paul Vader

Kathy Lain

Joe Hersey

Mike Petersen

Kay Petersen

POWER Steering Committee

P.O. Box 1742
Gunnison, CO 81230

xc: Kathleen Klein
L.Richard Bratton, Esq.
Charles Cliggett, Esq.
David Baumgarten, Esq.
Robert S. Crites, Jr.

Colorado River Compact

37-61-101. Colorado River compact. The General Assembly hereby approves the compact, designated as the "Colorado River Compact", signed at the City of Santa Fe, State of New Mexico, on the 24th day of November, A.D. 1922, by Delph E. Carpenter, as the Commissioner for the State of Colorado, under authority of and in conformity with the provisions of an act of the General Assembly of the State of Colorado, approved April 2, 1921, entitled "An Act providing for the appointment of a Commissioner on behalf of the State of Colorado to negotiate a compact and agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming and between said States and the United States respecting the use and distribution of the waters of the Colorado River and the rights of said States and the United States thereto, and making

an appropriation therefor.", the same being Chapter 246 of the Session Laws of Colorado, 1921, and signed by the Commissioners for the States of Arizona, California, Nevada, New Mexico, Utah, and Wyoming, under legislative authority, and signed by the Commissioners for said seven States and approved by the Representative of the United States of America under authority and in conformity with the provisions of an Act of the Congress of the United States, approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.", which said compact is as follows:

Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact, under the Act of the Congress of the United States of America approved August 19, 1921, (42 Statutes at Large, page 171), and the Acts of the legislatures of the said states, have through their Governors appointed as their commissioners:

W. S. Norviel, for the State of Arizona;
W. F. McClure, for the State of California;
Delph E. Carpenter, for the State of Colorado;
J. G. Scrugham, for the State of Nevada;
Stephen B. Davis, Jr., for the State of New Mexico;
R. E. Caldwell, for the State of Utah;
Frank C. Emerson, for the State of Wyoming;

who, after negotiations participated in by Herbert Hoover appointed by the President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Article II

As used in this Compact: -

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

ıe drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governor of the signatory states and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the Legislative ratification of the signatory States and the Congress of the United States of America.

Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purpose of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.

Article V

The Chief Official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall co-operate, ex officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

Article VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

Article VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of waters in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Article X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

Article XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

EXHIBIT "C" pg 2

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roval by the Congress of the United States.

In Witness Whereof, The Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this Twenty-fourth day of November, A.D. One Thousand Nine Hundred and Twenty-Two.

W. S. Norviel,
W. F. McClure,
Delph E. Carpenter,
J. G. Scrugham,
Stephen B. Davis, Jr.,
R. E. Caldwell,
Frank E. Emerson.

Approved:
Herbert Hoover.

Source: L. 23: p. 684, § 1. not in CSA. **CRS 53:** § 148-2-1. **C.R.S. 1963:** § 149-2-1.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310, 373, 374.

C.J.S. See 81A C.J.S., States, § § 8, 31; 93 C.J.S., Waters, § § 5-8.

Law reviews. For article, "Water for Oil Shale Development", see 43 Den. L.J. 72 (1966). For comment, "Bryant v. Yellen: Perfected Rights Acquire New Status Under a Belated Clarification of Arizona v. California", see 58 Den. L.J. 847 (1981). For article, "The Law of Equitable Apportionment Revisited, Updated and Restated", see 56 U. Colo. L. Rev. 381 (1985). For article, "Competing Demands for the Colorado River", see 56 U. Colo. L. Rev. 413 (1985). For article, "Management and Marketing of Indian Water: From Conflict to Pragmatism", see 58 U. Colo. L. Rev. 515 (1988).

37-61-102. Compact effective on approval. That said compact shall not be binding and obligatory on any of the parties thereto unless and until the same has been approved by the legislature of each of the said states and by the congress of the United States, and the governor of the state of Colorado shall give notice of the approval of said compact by the general assembly of the state of Colorado to the governors of each of the remaining signatory states and to the president of the United States, in conformity with article XI of said compact.

Source: L. 23: p. 693, § 2. not in CSA. **CRS 53:** § 148-2-2. **C.R.S. 1963:** § 149-2-2.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310.

C.J.S. See 81A C.J.S., States, § § 8, 31.

37-61-103. Approval waived. That the provisions of the first paragraph of article XI of the Colorado River Compact, making said compact effective when it has been approved by the legislature of each of the signatory states, are hereby waived and said compact shall become binding and obligatory upon the state of Colorado and upon the other signatory states, which have ratified or may hereafter ratify it, whenever at least six of the signatory states have consented thereto and the congress of the United States has given its consent and approval, but this article shall be of no force or effect until a similar act or resolution has been passed or adopted by the legislatures of the states of California, Nevada, New Mexico, Utah, and Wyoming.

Source: L. 25: p. 525, § 1; not in CSA; CRS 53, § 148-2-3; C.R.S. 1963, § 149-2-3.

Am. Jur.2d. See 78 Am. Jur.2d, Waters, § § 309, 310.

C.J.S. See 81A C.J.S., States, § § 8, 31; 93 C.J.S., Waters, § 7.

37-61-104. Certified copies of compact. That certified copies of this article be forwarded by the governor of the state of Colorado to the president of the United States, the secretary of state of the United States, and the governors of the states of Arizona, California, Nevada, New Mexico, Utah, and Wyoming.

Source: L. 25: p. 526, § 2. not in CSA. **CRS 53:** § 148-2-4. **C.R.S. 1963:** § 149-2-4.

HISTORIC FLOW AT LEE FERRY
1953-1995

Unit 1,000 a.f.

A[1] Water Year Ending Sept 30	B[2] Historic Flow G.C.Pt	C +1000	D +750	E[3] Progressive 10-Year Total
1953	8,805	✓		
1954	6,116			
1955	7,307			
1956	8,750	✓		
1957	17,340	✓	✓	
1958	14,260	✓	✓	
1959	8,788	✓		
1960	9,192	✓		
1961	6,674			
1962	14,790	✓	✓	
1963	2,520			99,000
1964	2,427			93,705
1965	10,635	✓	✓	90,016
1966	7,070			93,544
1967	7,824	✓		82,864
1968	8,356	✓		83,146
1969	8,850	✓		77,246
1970	8,666	✓		76,340
1971	8,807	✓		78,636
1972	9,330	✓	✓	80,708
1973	10,141	✓	✓	75,308
1974	8,277	✓		82,530
1975	9,274	✓	✓	68,780
1976	8,404	✓		67,218
1977	8,269	✓		67,843
1978	8,360	✓		68,266
1979	8,333	✓		84,290
1980	10,850	✓	✓	87,782
1981	8,316	✓		90,044
1982	8,323	✓		86,753
1983	17,520	✓	✓	86,746
1984	20,618	✓	✓	96,125
1985	13,106	✓	✓	106,368
1986	15,986	✓	✓	116,201
1987	13,450	✓	✓	126,573
1988	8,231	✓		131,754
1989	7,985	✓		131,616
1990	7,062	✓		131,278
1991	8,111	✓		126,280
1992	8,002	✓		126,075
1993	8,137	✓		127,754
1994	8,306	✓		116,371
1995	9,605	✓	✓	106,158
				96,555

Storage in Flaming Gorge and Navajo Reservoirs began in 1962.
Storage in Glen Canyon Reservoir began in 1963.
Storage in Fontenelle reservoir began in 1964.
Based upon provisional streamflow records subject to revision.
Note: The 1995 flow is 9,465,100 a.f. at Lees Ferry, Arizona and 19,543 a.f. at the Paria River.

EXH "B"

1996	11527	✓	✓	
1997	13287	✓	✓	
1998	13540	✓	✓	